The Central Law Journal.

SAINT LOUIS, FEBRUARY 23, 1877.

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CURRENT TOPICS.

SIMULTANEOUSLY with the complaints which are arising from lawyers and litigants in this country, regarding the inability of most of our appellate courts to keep up with the cases submitted to them, the crowded state of the dockets, and the apparent impossibility of decisions being rendered without interminable and vexatious delays, the English newspapers record a like difficulty in that country. All the divisions of the Supreme Court of Judicature are crowded. The block in the chancery division is said to be attributable to the persistence of suitors in bringing common-law actions in that division, for the reason, as suggested by a leading member of the bar, that they prefer this branch of the court where they are able to have their cases tried by a judge without a jury—a statement, which, if made a few years ago, would have been regarded as a joke, but which at present, under the recent amendment to the law, is possibly correct. The protests, which come from the profession concerning the loss which is brought upon litigants by the law's delay, are to be found in the newspapers, and some of them furnish information both amusing and instructive. They complain of the loss and inconvenience to both lawyer and client, which, under ordinary circumstances, the inadequacy in the number of supreme court judges entails, but are particularly exercised that causes of great importance are laid aside to permit the judges to settle some question of ecclesiastical law or discipline, and that "the real work of litigation is neglected while this trumpery question of candles, vestments, and attitudes, about which no sane man ought to care one pinch of snuff, is being solemnly argued before a bench of judges strong enough to decide on the most vital question which could come before a court of law." "The evil," writes an old practitioner, "is most crying. The remedy for it does not consist in codification, as the Lord Chief Justice vainly suggests, or in any other sweeping measure of law reform. Our common-law procedure acts and our judicature acts—monuments of the enlightened jurisprudence of our time—have already done as much for the change of our law and practice as is necessary for many years. If the provisions of these acts were successfully carried out by the bench and the bar, litigants would have no cause of complaint." To remedy the complaints, numerous suggestions have been advanced by many members of the bar, the principal ones being, the appointment of more judges, the selection for the bench of younger men, the referring of cases involving accounts to arbitrators before trial, the utilization for the purpose of trials of questions of fact of local courts, and the payment of official referees by the government.

THE question which is now agitating the minds of some 30,000 policy-holders of the Saint Louis Life Insurance Companies, is, "does life insurance insure?" We feel assured that in some cases it does not, and of this fact we have lately had a most pointed demonstration. A gentleman residing in Alabama placed in our hands a policy for $5000, of the Mound City Life Insurance Company, now called the Columbia Life Insurance Company, for advice as to what course he should pursue with reference thereto. Upon this policy he had made seven annual payments, amounting in the aggregate to $788.20 in cash, and had given premium notes for $368.45, upon which he had paid interest at the rate of eight per cent. per annum in advance. This is what is called a "participating policy;" that is to say, the holder of it is entitled to participate in any dividends which may have accrued from the profits of the company's business. A careful computation shows that these dividends have amounted in seven years to $23.55, or a little over three dollars a year! It would naturally be supposed that, when an insurance company had received this amount of premiums in cash, on which it has had the benefit of interest, and, in addition to this, a considerable amount of cash paid by way of interest on the so-called loan secured by the policy, he would be entitled to a paid-up "participating policy," to say the least, considerably in excess of the amount of premiums paid in. Instead of this, the secretary of the company informs us that, on surrender of this policy in compliance with its terms, the outstanding indebtedness will be canceled, and a paid-up all-cash "participating policy" will be issued, for $312.00, considerably less than half the amount of premiums paid in cash, to say nothing of interest paid on premium notes. Comment upon this case might be considerably prolonged; but it would be useless to draw comparisons between what this man was no doubt promised by an over-zealous agent, and what he is now offered by an insolvent company. We might repeat the inquiry made in a former issue: What has the insurance department of this state been doing all these years, that such a result should come to pass? So far as public opinion is concerned, that department has been weighed in the balance and found wanting. It might also be useful to inquire whether the criminal code might not be so amended as to reach abuses of this character. Is there not room for a statute which will make the agents of these concerns, who fraudulently entrap people

into their delusive schemes, and the managers who mal-administer the assets, amenable to the criminal justice of the country? Gibbon somewhere says that corruption and fraud are the prices paid for liberty. The American people have paid these prices in too great a measure, and one almost wishes that we could have an hour or a day of the despotism of Russia, or of Japan, so that the knout, the exile to Siberia, and the headsman's axe might cure some who have been too thrifty and ambitious.

SPIRITUALISM, after sustaining, in the person of Dr. Slade, a considerable discomfiture by virtue of the English vagrant act, has achieved a marked victory over its persecutors through the uncertainty of the art of criminal pleading. The conviction of the medium was obtained under the fourth section of "An act for the punishment of idle and disorderly persons, and rogues and vagabonds, in that part of Great Britain called England," which provides that "every person pretending or professing to tell fortunes, or using any subtle craft, means or deceit, by palmistry or otherwise, to deceive and impose on his majesty's subjects," shall be liable to the penalties imposed by the act. The case coming before the sessions on appeal, it was found that the words, "by palmistry or otherwise," had been omitted from the conviction. Thereupon it was contended by the counsel for the defendant that, in omitting these words, the conviction was bad; that, if these words were mere surplusage, the section was wide enough to cover any imaginable fraud, including cheating at cards, false pretences and forgery, at common law. The court took this view of the case and quashed the conviction; and, under the principles of criminal pleading, it would seem that its decision was correct, although no one contended that the craft which the defendant practiced was at all in the nature of palmistry. An English legal periodical, in commenting on the decision, is obliged to enter its protest in regard to the absurd and irrational system of criminal pleading at common law. "An indictment," it says, "for burglary would be bad without the word 'burglariously,' though it set out the existence, in fact, of all the elements that constitute a burglary. The allegation for want of which the conviction in Slade's case was held bad was, that the subtle craft was by 'palmistry or otherwise.' But the 'craft' alleged in that case clearly was not by palmistry. It is at least a very awkward device to have to say that it was by palmistry or otherwise; and, can anything be more absurd, than that a question of some importance should be burked by the interposition of such a trumpery technicality as this? Can anything show more distinctly the vices of the existing system of criminal pleading? We may add that we see a possibility of considerable difficulty arising in future from this application of the *ejusdem generis* theory with regard to the framing of criminal pleadings. Suppose, for instance, that a by-law of a railway company forbade a passenger from taking any 'dog, cat, or other animal' into a railway carriage with him, and the question was whether the taking of a parrot into the carriage was an offence under the by-law, the conviction would have to allege, it would appear, that the parrot was a 'dog, cat, or other animal.' It could hardly say, it was 'another animal' only, and to say that it was 'an animal other than a dog or cat' would seem equally to fail to hit the mark." But the end is not yet. Since what we have quoted above was written, a rule *nisi* has been issued from the Court of Queen's Bench to the sessions to hear the case upon its merits, where the defendant will have an opportunity of showing that he is neither a rogue nor a palmister.

THE St. Louis Globe-Democrat replies to the strictures contained in our issue of last week upon its inconsiderate attack upon the whole legal profession, in an article much more temperate and candid; so much so that we are glad to say that we concur in a great deal which it says. We must, however, protest against the attempt of the Globe-Democrat to array this journal among "the supporters of legal extortion, corruption and oppression." We have used our earnest endeavors since this journal was established to oppose legal extortion, corruption and oppression, and in every way to elevate the standard of the legal profession. Whenever the Globe-Democrat or any other newspaper will put its finger upon some specific act of extortion or oppression, we will join heartily with it in arraigning the person or persons guilty of such act, before the bar of public opinion. It is needless to attempt to disguise the fact that the standard of professional ethics among a portion of the American bar, like the standard of journalism, has sunk very low. Bar associations are unfortunately liable in too great a degree to the impeachment of the newspaper in question. A stream can not rise higher than its fountain, and no class of men can be expected to frame laws for the punishment of offences of which they themselves are guilty. Bar associations are liable to become swamped with members of the profession whose interest is not to prevent those practices which bring the profession into disrepute. We have good authority for the suggestion that if liars and swearers were hung, "then the liars and swearers were fools; for there are liars and swearers enough to beat the honest men and hang up them." Whenever the honest members of the legal profession commence a struggle against the dishonest practices which have brought the profession into popular disrepute, they may well be thankful for assistance from whatever quarter it comes; and in that event we shall be glad to take hold of the celebrated towline of the Globe-Democrat, and give a long pull, a strong pull and a pull altogether, for the purpose of hoisting the legal profession out of the quagmire into which it has been sunk through the practices of its unworthy members. We must add, as a mere incident to this discussion, a word about "divorce shysters." We certainly hope that the newspaper

in question will at once set itself right before the public, and show the sincerity of its professions, by expelling from its columns the advertisements of Goodrich and Sims. Goodrich advertises himself as an attorney at law; but it is well known that he is not an attorney at all, but that he was disbarred a year ago by the Supreme Court of Illinois, through the efforts of the Chicago Bar Association. He would be now what he professes to be, an attorney at law, if it had been left to the newspapers to disbar him. Therefore, when a newspaper publishes his advertisement, in which he announces himself to the public as an attorney at law, it publishes what a well-informed newspaper manager must know is a direct falsehood. In our judgment the case is as bad as that of a lawyer who, for money paid him by his client, pronounces a deliberate falsehood in a court of justice. Sims, the other Chicago divorce man, whose card the Globe-Democrat publishes, is not even a lawyer, but an ignorant fellow who can not write good English, and who undoubtedly gets his nefarious work done, as Goodrich does, through lawyers in apparent good standing, who are unknown to the courts as having any connection with these men. A bill has been introduced into the Illinois Legislature, if we recollect aright, making it a misdemeanor in any newspaper to publish the cards of such persons. We hope it will pass, and that some of the reformers in our own Legislature will seize upon the occasion, and get a similar bill through before the adjournment.

ENJOINING THE PUBLICATION OF LIBELS.

In almost every large city of the United States, and perhaps in England, the business of blackmailing is carried on to a considerable extent. Small publications, ostensibly assuming the character of newspapers, and perhaps pretending to a small degree of respectability, are really maintained for the purpose of extorting money from such individuals or corporations as prefer submitting to robbery rather than to libel. Nor are the persons who thus submit to extortion much to be blamed. The natural appetite for libel is very difficult to satiate. Every man against whom a libel is published may expect that it will be widely read, and, to say the least, not altogether discredited. Recourse to proceedings at law augments the publicity of the libel, and, except in rare instances, proves as damaging to the libeled as to the libeler. Hence in several recent cases the aid of equity has been sought. In the city of San Francisco an injunction was recently, after full deliberation, issued out of one of the district courts, restraining the publication of a libel. In all the other cases in this country coming within our knowledge, the right to preventive relief has been denied. The subject is still of sufficient importance to justify a review of the authorities and of the reasons which have been urged in their support.

The Court of Star Chamber exercised jurisdiction in cases of "scandalous libeling" (1 Spence Eq. Juris. 350); but this court, through the tyrannical exercise of its authority, became so odious, that it was abolished by statute 16 Car. I., c. 10. In 1680, about half a century after the abolition of the Court of Star Chamber, an information was filed in the crown office against Henry Carr, or Care, for printing and publishing a book entitled "The Weekly Pacquet of Advice from Rome, or the History of Popery." 7 State Trials, 1111. Carr was tried before Lord Chief Justice Scroggs, at Guildhall, in July, 1680, and through the manifest efforts of the Chief Justice and of Sir George Jeffries, the Recorder, was found guilty by the jury. In the same year, the House of Commons presented articles of impeachment against the Chief Justice, specifying eight different offences. 8 State Trials, 197. In the third of these specifications it is charged that Scroggs, with the other judges of the Court of King's Bench, before the conviction of said Carr of any crime, "did make a rule against the printing of the Weekly Pacquet of Advice from Rome, or the History of Popery;" and his conduct in this respect is claimed to have been "most apparently contrary to all justice, in condemning not only what had been written without hearing the parties, but also all that might for the future be written on that subject; a manifest countenancing of popery and discouragement of protestants, an open invasion of the right of the subject, and an encroachment and assuming to themselves a legislative power and authority." The articles of impeachment were presented to the House of Lords, where, soon after, the "affair was dropped." 8 State Trials, 216. This futile impeachment of Scroggs has frequently been referred to as affording strong assurance, that his action in granting a rule against a libel was thought worthy of the most severe censure. But all of the proceedings, both in the trial of Carr and on the impeachment of the judges, show that the whole controversy was religious and political. Scroggs was intent on suppressing all attacks on the Roman Catholic Church. His adversaries inclined to frenzy at anything savoring of popery; and neither side thought or cared anything about the abstract question, whether, in a proper case, the publication of a libel could be prevented. While a cause is pending, the courts will not permit the parties thereto to be prejudiced before the hearing; and they will take such steps as may be necessary, to prevent or punish any publication which, by defaming either of the parties or witnesses, or by misrepresenting the proceedings, or by any other means, seeks to prevent the administration of justice or to bring it into disrepute. Townshend on Slander and Libel, § 231; 2 Atk. 469; Daw v. Eley, 17 W. R. 245; s. c., L. R. 7 Eq. 49; *In re* C. & S. R. W. Co. & W. Co., 17 W. R. 463; s. c., L. R., 8 Eq. 580; Tichborne v. Tichborne, 15 W. R. 1072; L. R., 7 Eq. 55.*

In the year 1742, Lord Hardwicke, in a case calling for the application of the rule just stated, went outside the question before him, and said: "Whether it is a libel against public or private persons, the

only method is to proceed at law." 2 Atk. 469. In 1810 an action was tried before Lord Ellenborough, to recover for injuries done to a picture claimed to be of a libelous character. His Lordship is reported as saying: "If it was a libel upon the persons introduced into it, the law can not consider it valuable as a picture. Upon an application to the Lord Chancellor, he would grant an injunction against its exhibition." Du Bost v. Beresford, 2 Camp. 512. The case of Gee v. Pritchard, 2 Swans. 402, decided in 1818, involved the right of the complainant to an injunction against the publication of letters written by himself. Lord Eldon, however, thought proper to remark in the course of his decision, that "the publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants." In 1848, Lord Langdale, Master of the Rolls, refused an injunction to prevent the defendant from advertising certain pills under a name tending to indicate that they were prepared or prescribed by the plaintiff. To justify this refusal, his lordship said: "I think the granting the injunction in this case would imply that the court has jurisdiction, to stay the publication of a libel, and I can not think it has." Clark v. Freeman, 11 Beav. 112; s. c., 17 L. J. R. In the same year, Lord Chancellor Cottenham, in Fleming v. Newton, 1 H. L. R. 375, doubted the authority of courts of equity to restrain the publication of libels. In 1861, the case of the Emperor of Austria v. Day & Kossuth, 3 DeG. F. & J. 230, s. c., 9 W. R. 712, was decided by Lord Chancellor Campbell. In this suit the Emperor of Austria sought to prevent Kossuth and others from printing or circulating paper purporting to represent public paper money of Hungary. The case did not in any respect involve the law of slander or libel. The Chancellor, however, thought proper to make the following remark: "I have no hesitation in saying that Lord Ellenborough was wrong, when he laid down, in Du Bost v. Beresford, that "the Lord Chancellor would grant an injunction against the exhibition of a libelous picture."

In 1868, Vice-Chancellor Malins decided that he would interfere by injunction to restrain the issuing of certain placards and advertisements, whereby the defendants intimidated plaintiff's workmen, and prevented workmen from hiring themselves to plaintiff. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551. A year later the same judge enjoined a defendant from publishing a statement that the plaintiff was a partner in a certain bankrupt firm. Dixon v. Holden, L. R. 7 Eq. 491, s. c., 17 W. R. 482. In 1872, the same judge restrained the publication of a circular, threatening to prosecute all dealers who should engage in selling certain lamp-burners, of which the plaintiff was the patentee. Rollins v. Hinks, 20 W. R. 287, L. R. 13 Eq. 355, 41 L. J., Ch. 358; 26 L. G. 56. In each of the cases decided by Vice-Chancellor Malins, the advertisements or circulars were shown to have a damaging effect upon the complainant's property, and the decisions were such as to support the general rule that equity will, where there is no adequate remedy at law, interfere to restrain any proposed libel, which, if not restrained, would destroy or impair the complainant's right of property. But these decisions of Vice-Chancellor Malins, as well as the *dictum* of Lord Ellenborough, in Du Bost v. Beresford, are now unquestionably overruled in England. Prudential Life Insurance Association v. Knott, 23 W. R. 249; L. R. 10 Ch. App. 142; 44 L. J., Ch. 192; 31 L. T. 866, 7 Ch. L. N. 405. In the case last cited, the complainants sought to enjoin the publication of a pamphlet containing, it was alleged, statements which were unfounded in fact, and which were highly injurious to the complainant's trade and business. Lord Chancellor Cairns delivered the principal opinion of the court, and, in doing so, said: "Now, the comments and expressions contained in this pamphlet either amount to a libel on the company in their business, or they do not. If they do not, and are therefore innocuous, I am at a loss to see on what principle the court of chancery is to interfere, either as a *censor morum*, or as exercising some right of criticism to restrain the expression of opinions which might be held justifiable in a court of law. If, on the other hand, these comments amount to a libel, I have always understood it to be clearly settled, that the court of chancery has no jurisdiction to restrain the publication of a libel, because it is a libel." His lordship then proceeded to consider the claim that his interference was warranted by the fact that the libel would injure property, and, after reviewing the prior decisions, he determined that this fact did not invest him with authority to grant the desired relief.

Injunctions against libels have not been frequently considered in the courts of last resort in America; and when under consideration, the question has usually been complicated by local statutory or constitutional provisions, guranteeing in general terms the freedom of speech or of the press. The leading American case was decided by Chancellor Walworth in 1839. Brandreth, who had acquired considerable notoriety as the maker and vendor of certain pills, sought to enjoin the publication of a pamphlet, which he considered as a libel upon himself. In the opinion of the Chancellor, some stress was laid upon the statute of the state, and some upon the fact that the pamphlet was not alleged to be likely to injure the complainant's business. But aside from these circumstances, it is evident that the injunction would have been denied. Brandreth v. Lance, 8 Paige Ch. 23. Other American cases have been decided which, while not necessarily involving the law of libel, show that the courts in this country are fully committed to the view finally adopted in England. Singer

*It appears from a note to Burnett v. Chetwood, 2 Merivale, 441, that an injunction once issued to restrain the publication of a translation of a book from Latin into English. The chancellor in this case did not base his action on the ground that the book was libelous. He claimed the right to suppress it, because of its hurtful tendency on the public.

Co. v. Domestic Co. 49 Geo. 71; Boston D. Co. v. F. M. Co. 114 Mass. 69.*

The American case most directly in point, and perhaps the best considered, is that of Life Ass. of America v. Boogher, determined in St. Louis Court of Appeals and reported in 4 Cent. L. J. 40. The circumstances of the case were very similar to those of the Prudential Life Insurance Association v. Knott, already referred to. If it were possible to obtain an injunction against a libel, the facts alleged in both these cases authorized its issue. But in both it was refused. It is true that the Constitution of the State of Missouri declares "that every person may freely speak, write or print on any subject, being reponsible for the abuse of that liberty." But the opinion of the court leaves no doubt in our minds, that the injunction would have been denied in the absence of this constitutional provision.

Conceding, therefore, as we must, that the authorities overwhelmingly establish the proposition that equity has no jurisdiction to restrain the publication of a libel, even though its publication threatens to prove ruinous to personal reputation, or to rights of property, or to both, let us inquire on what principles this rule is based. And here we think, every candid lawyer must admit that, in most of the reported cases, the judges have reasoned either very poorly or not at all. Lord Eldon, as we have shown, was content to remark, "the publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes." But surely, equity has no tender regard for criminals, nor is its arm paralyzed by the mere presence of crime. Lord Chancellor Cottenham, in Fleming v. Newton, 1 H. L. R. 375, doubted the right to interfere by injunction, because such interference would impair the right to trial by jury. But if injunctions are to be refused in every case in which an issue of fact can be formed, then they must soon become obsolete. The reason which is now urged as the most unanswerable is, that it would be dangerous to concede to equity any control over the liberty of speech and of the press. And certainly, if there is any reason why equity ought not to interfere, this is the true one. But is it not less dangerous to confine even the freedom of writing and speaking within such bounds as an enlightened judiciary may see are indispensable to the protection of character and property, than it is to admit that the right to abuse this freedom is practically above and beyond the law? The power of the press is so great, and the necessity, upon grounds of public policy, of permitting everything like fair or decent criticism of public and private persons is so obvious, that, were the power to enjoin libels conceded, we might rest assured that it would be exercised in none but the clearest cases. Ordinarily, equity will interfere in cases of irreparable injury, where no adequate remedy exists at law. And certainly, many libels do prove irreparable injuries both to persons and property, and are obviously published to accomplish that result. In but few cases has the injured party any adequate remedy at law. Nor is the fact that the libeler is liable to conviction and punishment for his crime worthy of any special consideration. No court of equity would refuse to enjoin an irresponsible person from tearing down my house or laying waste my lands, on the suggestion that such person might, if permitted to proceed, be tried and perhaps punished under an indictment for malicious mischief. A. C. F.

*In the second edition of Townshend on Slander and Libel, p. 91, Meserole v. Goldsmith, decided in New York in 1870, and Miller v. Shepherd, decided in Missouri, are referred to as authorities, for enjoining libels. We have never seen any report of either case.

GARNISHEE ORDER NOT A JUDGMENT.

ATLANTIC AND PACIFIC RAILROAD *ET AL.* v. HOPKINS.

Supreme Court of the United States, October Term, 1876.

Under the Kansas code, the order in a proceeding in aid of execution directing a garnishee to pay to the judgment-creditor money which he owes the judgment-debtor, gives a right of action only, and is not a judgment.

Hopkins obtained a judgment in the United States Circuit Court for the district of Kansas, against the St. Louis, Lawrence & Denver Railroad Company, for some $6,000, and issued execution thereon, which was returned unsatisfied. Then garnishee summonses were issued against each of the plaintiffs in error, and interrogatories administered under the Kansas code practice, to which they filed in due course answers under oath.

The Pacific Railroad Company admitted, it was lessee of the judgment-debtor's railroad, under an elaborate instrument set out in its answer, but claimed various items of set-off, specifically set forth against the rental accruing due under that lease, and the Atlantic & Pacific Railroad Company admitted, it had assumed all the liabilities of the Pacific Railroad. But both companies denied in general terms any indebtednes to the judgment-debtor. The same cause was before Judge Dillon, in Opdyke v. Pacific Railroad, 3 Dill. 55. Hopkins filed notice that the answers of the railroad companies were not satisfactory, and also moved for an order, "that they and each of them be forthwith required to pay into this court the amount of the judgment and costs in this action." Then the court (Dillon J.), over the objection of the garnishees, rendered judgment against them on their answers to the interrogatories, finding them to be indebted to the judgment-debtor, and ordered them to pay the amount of the original judgment and costs into court, or, in default, that execution should issue against them.

The first error assigned in the Supreme Court was the rendition of final judgment against the garnishees, on their answers, without suit, although they deny their indebtedness. The other errors assigned affected the merits of the case, and were not noticed by the Court.

J. P. Usher and *C. E. Bretherton*, for plaintiff in error; *Clough & Wheat*, for defendant in error.

Mr. Chief Justice WAITE delivered the opinion of the Court:

The Supreme Court of Kansas, since the order complained of in this case was made, has decided that an

order in a proceeding in aid of execution, under section 490 of the civil code of that state, directing a garnishee to pay to the judgment-creditor money which he owed the judgment-debtor, was not a judgment and did not determine finally the liability of the garnishee. The language of the opinion is as follows: "The making of it [such an order] is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee, that the debtor previously had. It is in effect only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater right than the debtor had, and the garnishee loses no rights. And the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action." Board of Education v. Scoville, 13 Kas. 32. In a previous case, Arthur v. Hale, 6 Kas. 165, it was held to be error to award execution against a garnishee to collect the money, in case he failed to make payment according to the order. As the practice in the courts of the United States must conform, as near as may be, to that in courts of the state (Rev. St., sec. 914), these decisions construing the practice acts of the state are binding upon the courts of the United States. It follows that the circuit court erred in directing that execution might issue in this case against the garnishee, if payment should not be made according to the order. To that extent the order of the circuit court is reversed, but in all other respects affirmed; the defendant in error to pay the costs in this Court.

The cause is remanded, with directions to modify the order complained of by striking out all that part thereof which directs that execution may issue.

NOTE.—Although the decision of the Court is in terms confined to the Kansas practice, yet the ruling seems applicable in all states which have adopted the New York code of procedure. Sec. 490 of the Kansas code is almost identical with sec. 297 of the code of New York, sec. 467 of that of Ohio, and sec. 719 of the California code; and those provisions have received the same limited construction as the Kansas section. See Rice v. Whitney, 12 O. S. 358; Edgarton v. Hanna, 11 O. S. 323; Welch v. R. R. Co., 11 O. S. 569; Bank of Rochester v. Bank of Sandusky, 6 O. S. 254; Rodman v. Henry, 17 N. Y. 482; Bank v. Pugsley, 47 N. Y. 368; Parker v. Paige, 38 Cal. 522.

INTERPRETATION—"PERSON."

UNITED STATES v. THE KANSAS PACIFIC RAILWAY COMPANY *ET AL.*

United States District Court, District of Kansas, February Term, 1877.

Before HON. C. G. FOSTER, District Judge.

The word "person," as used in the provision of the Revised Statutes of the United States prescribing penalties for the presentation of fraudulent claims against the government, does not include corporations.

On demurrer to plaintiff's petition.

Matt. H. Carpenter, S. W. Johnston, and *J. L. Pendery*, for plaintiff; *J. P. Usher, C. E. Bretherton* and *C. Monroe*, for the railroad company.

FOSTER, J.:

This suit is brought on the relation of John S. Pendery, to recover from the Kansas Pacific Railway Co. and others a large sum of money—$2,287,280.00—as a statutory penalty or forfeiture for presenting to the Treasury Department of the United States for payment, and receiving payment thereon, a lot of claims and vouchers for transporting troops, munitions of war, and military supplies over the railroad of the defendant company, from the year 1868 to 1875, which claims and vouchers the plaintiff alleges were false, fraudulent and excessive.

The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed. 18 Wall. 409; 2 Dill. 224. Under the common law of England, corporations could be indicted for misfeasance and nonfeasance, and the same principle has been recognized by many of the state courts in this country. It being settled, however, that there are no common-law offences cognizable by the United States courts, but only such as are declared so by act of Congress, it may be questioned whether the federal courts would follow the English rule on this subject. But that question is not important in this case.

The only point here is, whether or not corporations are included in the word persons, and as such liable to the penalty prescribed in sec. 3490 of the Revised Statutes, under which this suit is brought.

The tendency of modern decisions is to hold corporations liable as to duties and responsibilities, the same as individuals. 2 Dill. Corp. sec. 746. But after a careful reading of the law under which this suit is brought, and the Act of 1863, from which it is taken, I can not bring my mind to believe that Congress intended to include corporations within the provisions of the act. The whole tenor of the law seems to preclude its applicability to corporations. Sec. 1 of the Act of 1863 (U. S. Statutes at Large, vol. 12, p. 696) provides, if any person in the land or naval forces of the United States shall do any of the acts therein specified, being the same as prohibited by sec. 5438 of the Revised Statutes, he may be arrested and held to trial by court-martial, and, if found guilty, shall be punished by fine and imprisonment, etc. Sec. 3 of said act provides that any person *not* in the military or naval forces of the United States, * * * * who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs, etc., * * * * and every such person shall, in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine, etc.

Now, sec. 1 of this act is re-enacted in substance in sec. 5438 of the Revised Statutes, omitting its restriction to persons in the land or naval forces, and making it applicable to every person, whether in the land or naval forces or not, thus doing away with the distinction between such persons as are in the United States service and those that are not, and providing a common punishment for both classes. And sec. 3 of said act, which provides for a penalty and forfeiture by civil proceedings, is re-enacted in sec. 3490 of the Revised Statutes, omitting the punishment clause, which is provided for in sec. 5438.

If possible, in construing statutes, the legislative intent must be ascertained from the words of the act itself; and as the last act does not seem to indicate an intention to enlarge the scope of the act of 1863, but merely to arrange its provisions under different sections and titles, we may well look to the original act for light on this subject.

Did section 3 contemplate bringing corporations within its provisions? It would seem, not. It provides that every person, not in the military or naval forces, who shall commit the act, in addition to the penalty and forfeiture, may be imprisoned, etc. Sec. 5438, Rev. Sts., has the same provisions. These

statutes evidently refer to such a class as are capable of being employed in the land or naval forces, or in the militia.

It is further provided, in section 5 of the first act, that, in a suit to recover this forfeiture and damages, such person may be arrested and held to bail. The same provision is contained in section 3492 of the Revision. These various provisions of the law indicate to my mind that, in using the word *person* in the act of 1863, and in the Revised Statutes, it was the intention to restrict it to individuals, and not to make it applicable to corporations.

The demurrer to the petition will, therefore, be sustained.

DESCENT AMONG ILLEGITIMATES.

SCROGGINS v. BARNES *ET AL.*

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY, } Judges.
" THOMAS J. FREEMAN, }
" ROBERT MCFARLAND, }
" J. L. T. SNEED, }

Under sec. 2423 of the code of Tennessee, the estate of an illegitimate woman, who dies without children, will descend to her surviving husband in preference to her illegitimate sister. Sec. 2423, *a*, of the code, allowing the brothers or sisters of an illegitimate to take his or her estate, does not apply to such a case.

DEADERICK, C. J., delivered the opinion of the court:

The bill and amended bill show that complainant, a colored woman, and Harriet Walker, were sisters, both being illegitimate, and born of the same mother. Complainant alleges that her sister first married one Penney, and after his death married Walker, and died in August, 1869, leaving her husband surviving, but leaving no child, and no mother, nor brother, nor sister, except herself; and she files this bill to recover certain real estate, which said Harriet owned at the time of her death, situate in the city of Memphis. The defendants demur to the bill. The demurrer was sustained and the bill dismissed, and complainant has appealed to this court.

The question presented upon the demurrer is, whether complainant, as sister of said Harriet, is entitled to the estate left by her, she having died, leaving her husband surviving. And we are of opinion, she is not.

The case of Webb v. Webb, 3 Head, 69, was one of the death of an illegitimate, in June, 1858, leaving no child, but a widow and a mother, and legitimate brothers. It was held that the rule governing the case was found in code, § 2423; and, after quoting the section, the court declares the course of descent to be, under said section, first, to the child or children of the illegitimate, if any there be; if none, then to the surviving husband or wife; if there be no surviving husband or wife, then to the mother; and if no surviving mother, then to the brothers and sisters by the mother, or their descendants.

In this case there was no child surviving; but the bill states that there was a husband surviving, and claims that complainant is entitled to the estate before him, or in exclusion of him, under § 2423, *a*, act of 1866-7. That section provides, "where any *woman* shall die intestate, having a natural-born child or children, whether she also leave a legitimate child or children, or otherwise, such natural-born child or children shall take by the general rules of descent and distribution, equally with the other child or children, the estate, real and personal, of his, her, and their mother; and, should either of such children die intestate, without child, his or her brothers and sisters shall in like manner take his or her estate." It had been held in 1 Cold. 562, that the illegitimate, though born of the same mother, do not inherit equally with the legitimate, the estate of a deceased brother; and while a legitimate brother or sister could inherit from an illegitimate brother or sister, born of the same mother, an illegitimate brother or sister, though born of the same mother, could not inherit from a legitimate brother or sister. And, for the purpose of enabling the children, legitimate and illegitimate, born of the same mother, to take her estate equally, and also to enable them to inherit equally, as between themselves, the act of 1866-7, § 2423, *a*, was passed. But it was not intended by said act to change the course of descent prescribed in § 2423.

The chancellor's decree will be affirmed.

NOTE.—If the parties in this case had been of legitimate birth, the descent would have been cast upon the complainant, under the provisions of sec. 2420 of the Tennessee code. The act of 1819, ch. 13, was very nearly the same as sec. 2423, *a*, of the code, *supra*. This act went so far as to allow illegitimate children to take their mother's estate, according to the general rules of descent, in case she left no legitimate child. But no further rights of inheritance were conferred, so that an illegitimate child, claiming to inherit through her mother, who was dead, a share of her grandfather's estate, was held, as to this claim, to be still under the disabilities of the common law. Brown v. Kerby, 9 Hum. 460. The act of 1866-7, code 2423, *a*, allows illegitimates to take equally with their legitimate brothers and sisters, their mother's property; in this respect extending the benefits conferred by the act of 1819. It will be observed that the later act, in its second clause, provides that, "should either of *such* children die intestate, without child, his or her brothers and sisters shall, *in like manner*, take his or her estate." This clause is copied *verbatim* from the act of 1819. It was construed, in Riley v. Byrd, 3 Head, 20, as standing independent of the first clause of the same act; and, in that case, the brothers and sisters of an illegitimate were allowed to take his estate, "in like manner," that is, according to the general rules of descent. It would seem that the complainant in the principal case esteemed herself entitled to inherit her deceased sister's property, under the construction given to the statute in Riley v. Byrd. Webb v. Webb, 3 Head, 69, was decided by the same court, at the same term, under the act of 1851-2, ch. 39, now sec. 2423 of the code. That act provided, "when an illegitimate child dies intestate, without child or children, husband or wife, his real and personal estate shall go to his mother, and if there be no mother living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters." It was held, that this enumeration of relatives in order indicated, that such order was to control the descent of the property, and that, consequently, the estate of an illegitimate, dying without children, would go to his widow in preference to his brothers. This case arose in 1858, after the passage of the act of 1851-2. The case of Riley v. Byrd, heard at the same term, arose in 1848, and the court adjudicated it with reference to the act of 1819. The contrary results reached in these two cases, at the same term of the court, might appear to indicate that the two acts could not stand together, and consequently, that the later act had repealed the former. But it is clear that the last adjudication does not recognize any repeal in turn, of the act of 1851-2, by the latest act of 1866-7, though the latter is, as to the clause in question, identical with that of 1819.

It is further to be observed, that the object which, in the principal case, the court attributes to the legislature in passing the act of 1866-7, is quite different from any recognized by the Supreme Court, in 3 Head. Woodward v. Duncan, 1 Cold. 562, declined to extend the construction of these statutes so far as to allow the estate of a legitimate to descend under the provisions. "*Such*" children, was held to mean illegitimates only. The principal case suggests that the latest act was intended precisely to remove this restriction. But Riley v. Byrd construed the act of 1819 to apply in this respect only to the estates of "such" children, that is, illegitimates. The construction now

given to these statutes not only removes the restriction which the decision in Woodward v. Duncan recognized as then existing, but imposes in its place another, which takes away benefits then existing under the same statutes, as recognized by the decision in Riley v. Byrd. Legitimates might now perhaps inherit from their illegitimate brothers and sisters; but illegitimates may not.

The result of this decision is, that the case of Riley v. Byrd is disregarded, if not overruled, as an authority, and that both secs. 2423 and 2423, *a*, of the Tennessee code, which were apparently at variance under the decisions in 3 Head, *supra*, are allowed to stand together. P.

CONSTITUTIONAL LAW — PERPETUATION OF EVIDENCE OF TITLE.

IN RE GOODE.

Saint Louis Court of Appeals, October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

The act of March 28, 1873, entitled, "An act to establish evidence of title to real property, and to restore the records of the same and to provide for the recording of deeds," which provides that any person claiming an estate or interest in real estate where deeds have been lost or destroyed, may apply to the circuit court, and have an adjudication of the title according to the evidence adduced by him, is in conflict with sec. 32, art. 4 of the constitution of 1865, declaring that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed," and is unconstitutional and void, so far as it provides for proceedings which are to end in final judgment.

APPEAL from St. Louis Circuit Court.

LEWIS, C. J., delivered the opinion of the court:

This is a proceeding instituted under "An act to establish evidence of title to real property, and to restore the records of the same, and to provide for the recording of deeds," approved March 28, 1873. The petitioner, substantially following the terms of the act, sets out a chain of title under which she claims the real estate described, embracing a number of deeds, some of which, she alleges, have been lost or destroyed. Her prayer is as follows: "Wherefore, your petitioner prays the honorable court to hear and determine this petition, and adjudge, determine and decree that the title to the said undivided one-twenty-seventh part of said survey of land belongs to your petitioner, and that the same be vested in her in fee-simple absolute."

The first section of the act, with great particularity and much verbiage, provides, in effect, that any person claiming an estate or interest in any lands whose deeds have been lost or destroyed, may apply by petition to the circuit court of the proper county, setting forth a description of such lands, the nature of his interest therein, and a description of the lost deeds, by dates, contents, and parties therein. He shall also set forth the manner in which his deeds were lost or destroyed, and may pray the court to "hear and make a record of such evidence as the said petitioner or petitioners shall produce touching or concerning his, her or their alleged estate or interest in and to said lands described in his, her or their petition." Nothing here follows indicating, that the court is to make any such record as is prayed for. But, in lieu thereof, "upon hearing such testimony and proof of title as is produced by the said petitioner or petitioners, * * * the estate or interest of the said petitioner shall be adjudged and determined by the said court, according to the evidence adduced," etc.

The second section provides for notices by newspaper publications, addressed "to all whom it may concern," and by service on such persons as may be in possession of the land, and for a submission of proof at the next term of the court. The third section allows any person claiming an adverse interest in the lands to appear and answer the petition. Then, "if upon a final hearing, * * * the court shall find the allegations of said petition to be substantially proved, it shall order a decree, * * * adjudging said petitioner or petitioners to be seized of an interest and estate in the said lands, according to the allegations and prayer of the said petitioner or petitioners, which said decree shall be conclusive against all persons and parties who may appear and answer in said cause, or who shall have been personally served with notice, and shall be *prima facie* evidence against all other persons claiming said premises, from the time of entering of the said decree."

By the fourth section it is provided that any person claiming an interest in the lands adverse to the decree, who has not been personally notified, and has not appeared and answered, may, upon twenty days' notice, move to open the proceedings; whereupon proofs shall be heard and "the court shall adjudge the ownership and title of said lands, according to the evidence adduced," etc. If no such motion be made within two years, the decree becomes conclusive against all persons whomsoever, except infants, lunatics and married women, who may appear within two years after a removal of disabillity, etc.

The fifth section provides for a recording of the decree, and makes a certified copy evidence, etc. The sixth section requires the proceedings to conform, "as near as may be, to the rules and practice in civil cases." The seventh section authorizes a second recording of any deed, etc., when the first record has been lost or destroyed.

From this synopsis of the entire act, two things are apparent: First, that in all the judicial proceedings contemplated, the only possible result is a judgment or decree of title; which judgment is to be *prima facie* conclusive against some persons, absolutely conclusive against some others, and, in certain conditions, conclusive against all the world. Second, that in none of these proceedings is any action to be taken for "establishing evidence," as that expression is generally understood.

To establish evidence—which means to secure its preservation for possible future use in a judicial controversy—is one thing; to render a judgment or decree—which ends all controversy—is a very different thing. The one implies that the office of the testimony is yet unfulfilled; the other, that it has performed its functions and may henceforth be dispensed with. In the one case, the title or right remains in *statu quo* and liable to any countervailing proofs by the adverse claimants; in the other, it is divested of all existing uncertainty, and freed forever from the adverse and defeated claim. No further argument can be needed to show that the subject of rendering final judgment and decrees is not expressed in the title, "An act to establish evidence of title to real property, and to restore the records of the same, and to provide for the recording of deeds."

Section 32, article 4 of the State Constitution of 1865, declares that: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but, if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." The act before us violates this commandment in every aspect. Not only does it omit from the title the chief object to be effected by the body of the

act; it also excludes from the body the purpose most conspicuously displayed in the title.

The grossest frauds ever perpetrated in the legislation of the past, were those wherein an enactment enforced a duty or a measure, of which no notice appeared in the title. Careless or unsuspecting citizens and legislators, finding nothing objectionable in the title, were too often indisposed to look any further. The most obnoxious laws have thus gone undetected through all the forms of legislation, under an introductory disguise of innocence or apparent utility. Hence the practical wisdom of the constitutional provision above quoted. If any illustration of the wrongs it may prevent had been specially designed by the framer of the act under consideration, he could not have more happily succeeded. The citizen who should find nothing alarming in the establishment or perpetuation of any possible evidence affecting his right of title, might suddenly find the latter imperiled or destroyed by a process of very different import. If he happen not to have been served with personal notice, and to have neither seen nor heard of the newspaper publication "to whom it may concern," for the space of two years, he may find his title divested by a "conclusive" judgment, under the fourth section, and yet never be able to comprehend how such final destruction could lurk in a mere proceeding to "establish evidence."

For the reason stated, we find the act unconstitutional and void, in so far as it provides for proceedings which, in every instance, are to culminate in a final judgment; no reference being made in the title to any such conclusion. It can not be assumed that the act could be constitutionally enforced by a decree merely establishing the evidence, without any judgment upon the title. For, the whole proceeding being statutory and in derogation of the common law, it must be strictly followed. No provision is made for a decree or order establishing the evidence, and, therefore, no such decree or order would be authorized.

The provisions not relating to judicial proceedings may have been deemed desirable for the purpose of giving some color to the title of the act. They propose nothing whatever, that was not already provided for under the general law.

The parties who appeared or were summoned in this cause, under the provisions of the act, demurred to the petition, as not stating facts sufficient to constitute a cause of action, specifying the unconstitutionality of the legislation relied on, with other objections which we need not notice. The circuit court sustained the demurrer. Its judgment is affirmed. All the judges concur.

FRAUDULENT REPRESENTATIONS.

MILLER v. BARBER *ET AL.*

New York Court of Appeals, September, 1876.

HON. SANFORD E. CHURCH, Chief Justice.
" WM. F. ALLEN,
" CHARLES ANDREWS,
" ROBERT EARL,
" CHARLES J. FOLGER,
" CHARLES A. RAPALLO,
" THEODORE MILLER,
} Associate Justices.

1. ACTION FOR DECEIT—MEASURE OF DAMAGES.—In an action for damages for deceit in inducing a person, by fraudulent representations, to purchase stock, *held*, that where the representation of the value of a certain invention was accompanied with false representations of the purchase of stock in it by other persons, thereby inducing one to give credit to the representation of value, an action will lie for the fraud, and the measure of damages is the difference between the value of the stock as it was represented to be, and as it is in fact.

2. RETURN OF CERTIFICATE NOT NECESSARY.—In such an action it is not necessary to aver or prove that the plaintiff had offered to return the certificate of stock given him; though such an averment would be required in a suit to recover consideration for a contract which had been rescinded.

3. A DEFENDANT can not prove at the trial a variance between the pleadings as served on him and the record.

4. EVIDENCE OF REPRESENTATIONS TO OTHER PERSONS ADMISSIBLE.—In an action for fraudulent representations, it is competent to prove representations made to other persons, at or near the same time, and of a similar character, and under similar circumstances, on the question of fraudulent intent.

5. ——. ORDER OF PROOF.—The order of proof is a matter in the discretion of the court, and the declarations of a conspirator may be admitted against his co-conspirator, before proof of his connection with the conspiracy has been made; provided such proof is afterwards made.

ANDREWS, J., delivered the opinion of the court:

The objection was taken, on the trial, that the plaintiff could not maintain the action, for the reason that he did not return, or offer to return, to the defendants the certificate of stock in the "Union Patent Right Company," issued to him on his subscription to the capital stock, within a reasonable time after the discovery of the alleged fraud. The validity of the objection depends on the character of the action. The complaint contains all the allegations essential in an action for deceit in inducing the plaintiff, by fraudulent representations, to purchase a worthless stock. The *scienter* was sufficiently averred. 25 N. Y. 244. The summons was for relief, and judgment was demanded for the damages sustained by the plaintiff.

It was not necessary to aver or prove that the plaintiff had offered to return the certificate in an action for the deceit. The action was *ex delicto*, and not upon contract. The form of the summons, and the demand for relief, in connection with the allegations of the fraud, characterize it. If the action had been brought upon the promise which the law implies against a fraudulent vendor of real or personal property, to restore the consideration paid by the vendee upon his electing to rescind the contract, then plaintiff would have been bound to aver and prove that, upon discovery of the fraud, he had returned, or offered to return, what he had received upon it. But an action for damages for the deceit is brought consistently with an affirmance of the contract of sale, and the judge properly held, on the trial, that the averment in the complaint, of an offer to return the certificate, might be disregarded as surplusage. Hubbell v. Meigs, 50 N. Y. 487.

The answer of the defendant Barber contains a counter-claim arising out of an alleged contract between the plaintiff and Barber, made subsequent to the sale of the stock. The copy of the pleadings, furnished the court by the plaintiff, contained a reply denying the alleged counter-claim. The defendant Barber thereupon offered to prove that in fact no reply had been served, as was claimed by the plaintiff. The judge refused to hear the proof, and ruled that the case should proceed upon the pleadings furnished, leaving the defendant to his remedy by motion after the trial.

This was the former practice in respect to the *nisi prius* record. Wood v. Bulkley, 13 Johns. 486. And it was, we think, within the discretion of the judge to refuse to enter into this collateral issue at that stage of the proceedings. Moreover, the facts upon which the alleged counter-claim arose were shown upon the trial, and they were insufficient to establish a counter-claim in the action.

In order to understand the force of objections taken

on the trial by the defendants to the admission of evidence, it is proper to refer to the general features of the case, as disclosed by the testimony.

The "Union Patent Right Company" was a corporation organized under the general law for the formation of manufacturing and other corporations, passed February 17th, 1848. The certificate was dated February 23d, 1865, and was filed in the office of the secretary of state, January 13th, 1866. The object of the corporation, stated in the certificate, was the dealing in patent rights, and the manufacture and sale of patented articles. The capital stock was fixed at $35,000, divided into shares of $500 each. The defendants and five other persons were named as trustees for the first year. The defendants Barber and Schermerhorn were elected, respectively, president and secretary of the company, and the salary of the former was fixed at $500 a month. Both of the defendants took an active part in the organization of the company, and the office of the defendant Schermerhorn was also, for a considerable time, the office of the company. The promoters of the company, shortly before it was organized, had purchased, for the sum of $8,500, an interest in a patent "hay-loader," and had given their notes for the principal part of the purchase-money. These notes were outstanding, and the scheme was set afoot to organize a corporation on the basis of this property, and by sales of stock to realize the means for the payment of their liabilities, and to secure themselves for their advances. The interest in the patent was conveyed by the owners to the company soon after its organization, and was the only property which the company had to represent its nominal capital of $35,000. Both defendants were interested in the original purchase of the patent, and both were to be benefited by sales of stock.

In order to promote the sale of stock, various individuals of prominence in the community were solicited to subscribe for stock and to give their notes for the amount of their subscriptions, so as to give credit to the enterprise, upon the secret agreement, however, that the notes should be given up, after a short time, without payment. In several instances subscriptions were made and notes were given upon this understanding, which were subsequently surrendered in pursuance of it to the makers. These subscribers neither received the stock, nor paid their subscriptions. The plaintiff subscribed for one share of the stock, and gave his note for the full par or nominal value of the share. But he was not one of the persons with whom the agreement referred to was made. His note was payable to the defendants, or to one of them, and was transferred before maturity in part payment of notes given by the defendants and others to the patentee on the original purchase, and he was subsequently compelled to pay it. The negotiation with the plaintiff, which resulted in his subscription to the stock, was conducted by the defendant Barber in the back office of the defendant Schermerhorn, who, at the time, was in the front office and did not hear the conversation. The invention was represented by Barber to be of great value. He mentioned the names of the persons who had taken stock in the company, and these were persons who had allowed their names to be used and had given their notes to aid the enterprise, but who never took, and were never expected to take, stock in the company. Stock was sold to other parties, under similar circumstances and upon similar representations. Enough was realized from the sales to pay the advances and liabilities of the original purchasers of the patent. Some effort was made to introduce and sell the right to use the invention; but after a short time they were discontinued. No dividends were ever earned or paid by the company, and there was evidence tending to show that the invention was of no value.

It can not be doubtful that an action lies for the fraud practiced upon the plaintiff. The representation of the value of the invention was connected with a false representation of an extrinsic fact calculated to impose upon the plaintiff, to put him off his guard and to induce him to give credit to the representation of value. It had the effect it was designed to have. He relied, in taking the stock, in part upon the supposed judgment of other persons, who, as he was falsely informed, had taken stock in the company.

It is earnestly insisted, in behalf of the defendant Schermerhorn, that the evidence is insufficient to connect him with the fraud. It is quite true that he made no direct representations to the plaintiff; but the evidence warrants the conclusion that he knew, from its inception, of the scheme for securing fictitious subscriptions in aid of the sale of the stock, and that he accepted the benefits resulting from the fraud.

The judge permitted the declarations made by the defendant Barber, during his negotiation with the plaintiff for the sale of the stock, to be given in evidence as against the defendant Schermerhorn, before his connection with the company had been shown. The evidence was competent as against Barber. It became competent as against Schermerhorn when, by the facts subsequently proven, his connection with the fraud was *prima facie* shown. The declarations of Barber were not competent to show that Schermerhorn was a party to the fraud, nor were they admitted for that purpose. But, when evidence sufficient to submit to the jury had been given, tending to show that the defendants were jointly engaged in a common scheme to defraud the plaintiff and others, the acts and declarations of Barber in furtherance of the common design were admitted against both. The order of proof is, in general, a matter of discretion; and we are of opinion that no legal error was committed in allowing the declarations of Barber to be given in evidence as against his co-defendant, before proof of his connection with the conspiracy had been made. If the proof subsequently given had failed to connect Schermerhorn with the fraud, it would have been the duty of the court to have instructed the jury to disregard them in considering his liability. 1 Greenl. Ev., § 3; The People v. Parish, 4 Penn. 153; Sweat v. Rogers, 6 Tenn. 118; Page v. Parker, 40 N. H. 62.

The plaintiff was permitted to prove representations made by the defendants to other persons at or near the same time, and of a similar character as those made to the plaintiff, and under similar circumstances. This was competent upon the question of fraudulent intent. Cary v. Hoitaling, 1 Hill, 311; Hall v. Naylor, 18 N. Y. 588.

The court, in accordance with the request of the defendant, instructed the jury that the rule of damages was the difference between the value of the stock as it was represented to be and as it was in fact, and refused to charge that no recovery could be had, because no proof of difference in value had been given. The value of the stock depended upon the value of the invention. The company had no other property. The jury were authorized to find that the invention was without value, and from this fact that the stock was valueless also.

The defendants represented that the invention was a valuable one, and, as against the defendants, the jury could assume that, if the representations had been true, the stock would have been worth what the plaintiff paid for it. Page v. Parker, 40 N. H. 46. The court properly refused to charge as requested.

The court having charged, in substance, that the jury must be satisfied from the evidence, that the defendants were guilty of the fraud charged, before they could find a verdict against them, was then asked

to charge that the jury must be satisfied by clear and substantial proof. The charge, as made, stated the correct rule of law upon the subject, and the court was not bound to charge in the words used by the defendants.

There are many exceptions to evidence and to the charge, not here noticed. We have examined them and are of opinion that none of them are well taken. The judgment of the general term should be affirmed. All concur.

EXPRESS COMPANIES — THEIR LIABILITIES AS FORWARDERS.

SNIDER v. THE ADAMS EXPRESS CO.

Supreme Court of Missouri, October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" E. H. NORTON,
" WARWICK HOUGH,
" JOHN W. HENRY, } Judges.

1. CARRIER—STIPULATION LIMITING LIABILITY.—A carrier who receives freight to be forwarded beyond his own line, may stipulate that his liability shall terminate with the delivery of the freight to the next carrier.

2. SHIPPER—KNOWLEDGE OF STIPULATIONS.—Where the shipper receives a contract for such shipment, which, upon its face, purports to be something more than a receipt, it is not the duty of the carrier to point out the stipulations contained therein; but it is the duty of the shipper to read it, and in the absence of proof of fraud, imposition or deceit, it will be presumed that he had knowledge of its contents.

3. IT IS ERROR to instruct the jury to find upon an issue, to support which there is no evidence, for or against.

APPEAL from the Vernon Circuit Court.

T. Van Swearingen & Son, for respondent; *Wight & Gant*, for appellant.

NORTON, J., delivered the opinion of the court:

This was a suit brought by plaintiff to recover money alleged to have been lost from a package which defendant had received for transportation. The petition states, in substance, that defendant, as a common carrier, received from plaintiff a package containing $352.35, which he agreed to transport from Nevada, Vernon county, to Monroe City, Monroe County, and there deliver the same to Andrew Snider, and that for such transportation plaintiff paid defendant the sum of ninety cents. That defendant did not transport and deliver said package safely to said Andrew Snider, but so negligently and carelessly transported the same, that there was lost from the package the sum of $100.50. The defendant, by answer, denied all the material allegations of the petition, and set up, as matter of defence, that he did receive from plaintiff a sealed package said to contain $352.35, and at the time of its reception entered into a special contract with plaintiff, whereby it was agreed that defendant was only to forward the package to its agents nearest (or most convenient to) Monroe City, the place where said package was to be delivered, and then deliver the same to other parties to complete said transportation, and that such delivery was to terminate all liability of defendant. The answer further alleges that defendant safely delivered said package in good order, with contents unbroken or disturbed, to the United States Express Company at Sedalia, which was the nearest point to Monroe City to which defendant transported. Plaintiff, in his replication, denies all the allegations of defendant's answer.

On the trial of the cause, plaintiff offered evidence tending to show the delivery of a package, as charged in his petition, containing $352.35, which was received by defendant for transportation, and for which defendant at the time gave the following receipt:

"Adams Express Company.

"Form 15. $352.35. Nevada, Mo., July 13, 1872.—Received from H. I. Snider one package sealed, and said to contain currency, addressed Andrew Snider, Monroe City, Monroe County, Mo., upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then deliver the same to other parties to complete the transportation; such delivery to terminate all liability of this company for such package," etc.

The evidence of plaintiff tended further to show that the package, when delivered at Monroe City, was in good order, but was short of the amount inclosed in it about $101, containing only $251.25 at the time it came to the hands of the consignee.

The defendant offered in evidence the deposition of Faulkelier, tending to show that Sedalia was the nearest point of destination to Monroe City for packages shipped from Nevada to Monroe City by the defendant, and that defendant did not have any line of transportation directly through from Nevada to Monroe City, and that the package in question was on the 13th July, 1872, delivered by defendant in good order and unbroken to the United States Express Company, at Sedalia, by which company it was shipped to Monroe City. Defendant also offered in evidence the deposition of Warner to show that he was the messenger of defendant in charge of said package, that it was carefully carried from Nevada to Sedalia, and that defendant had no office nearer to Monroe City than Sedalia. Plaintiff objected to the reading of these depositions, on the ground of incompetency and irrelevancy, which objections were sustained by the court, and to which defendant at the time excepted.

The court, at the instance of plaintiff, gave the following instruction:

"If the jury believe from the evidence, that the plaintiff did, on the 13th of July, 1872, at Nevada, Vernon County, Mo., deliver, or cause to be delivered, to the agent of defendant, a package of money containing the sum of two hundred and fifty-two and 35-100 dollars; that the agent of defendant received the same and gave receipt therefor, and received pay to deliver said package to Andrew Snider, at Monroe City, and did not call the attention of H. G. Snider to the underwritten limitations of responsibility in the receipt read in evidence; that said package was received by Andrew Snider, at Monroe City, in good order, with a less amount of money in it than when delivered to the agent at Nevada; then the jury will find a verdict for plaintiff for the difference in the amount they may believe from the evidence was placed in the package at Nevada, and the amount in said package at the time of its delivery to Andrew Snider, in Monroe City, and may allow interest on the amount from the time of demand, made August 5, 1872, to the present time, at 6 per cent."

The court, of its own motion, gave the following instruction: "The court declares the law to be that, if the plaintiff at the time of delivering the package in question to the defendant's agent received a receipt for the said package, wherein it was expressly stipulated that defendant would not be responsible for the same beyond the station of defendant nearest to Monroe City and plaintiff's attention was called to, or he knew of such underwritten limitation at the time, and that, when it reached that point, defendant was to deliver the package to others, and that Sedalia was the nearest point on the route of defendant to Monroe City, and that defendant carried said package safely and in good order to Sedalia, and there delivered it to the United States Express Company in good order to complete the

transportation, then defendant was not liable any further, and the issue must be found for defendant." Exceptions were duly saved by defendant to the action of the court in giving these instructions.

The following instructions, asked by defendant, were refused by the court, to which defendant excepted:

"The court declares the law to be that, if the plaintiff, at the time of delivering the package in question to the defendant's agent, received a receipt for the said package, wherein it was expressly stipulated that defendant would not be responsible for the same beyond the station of defendant nearest to Monroe City, and that when it reached that point defendant was to deliver the package to others to complete the transportation, and that Sedalia was the nearest point on the route of defendant to Monroe City, and that defendant carried said package to Sedalia safely and in good order, and then delivered it to the United States Express Company in good order to complete the transportation, the defendant was not liable any further, and the issues must be found for defendant.

"The court instructs the jury that the defendant in this case, being a common carrier, had the right to limit its responsibility by special contract, and if the jury believe from the evidence that the defendant made a special contract with the plaintiff, whereby it accepted said package upon the express condition that it was not to be responsible for the same beyond its line, and if they find that defendant carried said package safely to Sedalia, the terminus of its route in the direction to Monroe City, Mo., and then delivered it to another responsible forwarder and carrier, then its responsibility ceased, and defendant is not responsible for any loss happening after that time."

The above were all the instructions given, except one which declares that it was the duty of plaintiff to prove that the package contained the amount of money it was said to contain. The jury found a verdict for plaintiff, upon which judgment was entered, and from which defendant has appealed.

The depositions offered in evidence by the defendant, and which were rejected by the court, should have been received as evidence. The evidence related directly to the issue involved, and was material to a proper determination of them.

The fact that the package received by defendant for transportation contained the sum of $352.35 at the time he received it, was denied by defendant, and he had a right to negative this fact by proof, which he proposed to do by evidence offered, in showing that the package when received was securely sealed, and that it was transmitted and delivered just as it was received, in good order, without being broken or mutilated. It was proper that these facts should have gone to the jury, to be considered and weighed by them in determining the question whether the package contained the amount of money charged to have been put in it. The evidence was admissible for another reason: It was shown by the plaintiff on the trial, that, at the time the package was delivered to defendant, defendant gave to plaintiff the receipt hereinbefore copied. This receipt contained the stipulation that defendant should only deliver the package to its agents nearest or most convenient to destination, and deliver the same to other parties to complete the transportation, and upon such delivery, all liability of defendant was to terminate. The depositions offered by defendant and rejected by the court tended to prove a compliance on the part of defendant with the above stipulations, and ought, therefore, to have been read in evidence.

The objection to the instruction given for plaintiff was well taken. The instruction directs the jury in effect that, unless the defendant called the attention of plaintiff to the underwritten limitations of responsibility in the receipt read in evidence, they were not binding on the plaintiff. In the case of Coates v. United States Express Company, 45 Mo., 241, the validity of a receipt, similar to the one in this case, was involved, and the contract contained in it was upheld, and it was declared to be the established law that a carrier may receive a parcel to carry as far as he goes, and then to send it further. That a common carrier, by a special contract, can limit his common-law liability, but can not exempt himself from his negligence, is established law. Read v. St. Louis, Kansas City and Northern Railroad Company, 60 Mo. 199; Levering v. U. T. and I. Co., 42 Mo. 88; Wolf v. A. M. Ex. Co., 43 Mo. 421; Ketchum v. Am. M. U. Ex. Co., 52 Mo. 390.

The dicta of the learned judge who delivered the opinion, 45 Mo. 241, that there was no proof of payment for the whole route, was not intended to convey the idea that, if there had been proof of payment for the whole route, it alone would have the effect to change the rights of the parties under the written contract.

The court committed error in assuming in the instruction, that it was the duty of the defendant to call plaintiff's attention to the stipulations in the receipt, before he could be bound by them. The stipulations were contained in the body of the receipt in a way not calculated to escape observation; they composed a part of it, were plainly written or printed, and the instrument itself showed on its face that it was not *merely* a receipt; and it being accepted by plaintiff in the transaction of the business to which it related, it was his duty to read it, and in the absence of proof of fraud, imposition or deceit, the law presumes he had knowledge of its contents. Grace v. Adams *et al.*, 100 Mass. 507; Belger v. Dinsmore, 51 N. Y. 166.

The instruction given by the court, of its own motion, ought not to have been given, because, by the exclusion of the depositions offered by defendant, there was no evidence in the case on which to base it. The instructions asked for by defendant, and refused by the court, were properly refused, because, by the exclusion of the deposition of defendant, there was no evidence on which to found them. If the depositions offered in evidence had been received, the principle embodied in the instructions asked for by defendant should have been given as the law. Judgment reversed, and cause remanded, the other judges concurring.

NOTE.—It is well settled that a common carrier may contract to transport freight to a point beyond his own line; in which event the better rule seems to be, that he will be liable for the negligence of the carrier to whom he delivers the freight, and that he can not stipulate against the effect of such negligence any more than against his own. C. H., etc., R. Co. v. Pontius, 19 Ohio St. 221; Noyes v. Rutland, etc., R. Co., 27 Vt. 110; Wheeler v. San Francisco, etc., R. R. Co., 31 Cal. 46; Peet v. C. & N. W. R. R. Co., 19 Wis. 118; T. P. & W. R. R. Co. v. Merriman, 52 Ill. 123; Kyle v. Laurens R. R. Co., 10 Rich. Law (S. C.), 382. But the rule is otherwise, where he undertakes simply to transport the freight over his own line, and then deliver it to a connecting carrier to be forwarded to its destination; in such a case he may stipulate against any liability for damage sustained by the freight after it leaves his line. The law does not require a carrier to transport freight beyond his own line; but he may by contract do so, or may simply undertake to deliver it to a connecting carrier; in which latter event his liability will cease with such delivery; for he has then done all the law, and all his contract requires him to do. Detroit & C. R. Co. v. Farmers', etc., Bank, 20 Wis. 122; C. H. & C. R. Co. v. Pontius, 19 Ohio St. 221; C. & N. W. R. Co. v. Montfort, 60 Ill. 175; People v. C. & Alton R. Co., 55 Ill. 95; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26; R. R. Co. v. Manufacturing Co., 16 Wall. 318; Schneider v. Evans, 25 Wis. 241; Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665.

The proof of the contract to transport beyond his own route should be clear. Penn. R. Co. v. Berry, 68 Penn. St. 272; Nutting v. Conn. River R. Co., 1 Gray, 502. Receiving

goods directed to a point beyond the carrier's line does not create an implied contract to transport them to that point. The weight of authority in this country, although the rule is different in England, is, that a carrier is only liable for injuries occurring beyond his own line when he expressly agrees to deliver the goods at that point. Morse v. Brainerd, 41 Vt. 550; Jenneson v. Camden, etc. R. Co. 5 Penn. L. J. Rep. 409; Burroughs v. Norwich R. Co. 100 Mass. 26. See *contra*, Ill. Cent. R. Co. v. Johnson, 34 Ill. 389; Foy v. Troy etc. R. Co., 24 Barb. 382; Condict v. Grand Trunk R. Co., 4 Lans. 166; Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88. The following instrument was held to be a through contract:

"VERMONT CENTRAL RAILWAY COMPANY,
BURLINGTON, Sept. 13, 1866.

Received from W. R. Lewis
1 Box, weight 350.

"Mark, and numbers,
W. R. Lewis,
Brooklyn, Iowa.

"Numbered and marked as above, which the company promises to forward by its railroad, and to deliver to ——— ——— or order, at its depot in ————, he or they first paying freight for the same, at the rate customary per ton of 2,000 lbs. N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner. G. S. APPLETON,
for the Corporation."

In construing the foregoing instrument, the court said: "A majority of the court are of the opinion that the receipt in this case, of itself, constitutes a contract between the parties that the defendants, being common carriers, would carry said box to its destination—Brooklyn, Iowa—as per the marks thereon. As giving such character and effect to the paper, much importance is attached to the fact that the blanks were left unfilled." Cutts v. Brainerd, 42 Vt. 566.

The following instrument was held by the Supreme Court of Connecticut, in Converse v. Norwich etc. Co. 33 Conn. 166, not to be a through contract:

"NEW YORK, May 7, 1864.

"Received from John M. Pendleton & Co., in good order, on board the Norwich and Worcester Boat, bound for Stafford, Ct., the following packages:

"Sixty-two (62) Bales Wool, 11,756 lbs.

"Marks,
"A.
"E. A. Converse & Son, C. of B.
"Stafford, Ct. Parker."

It was agreed by the parties that the wool mentioned in this receipt was taken on board The City of Boston, one of the steamboats of defendants, and carried to New London, and there landed and put into a depot building on the wharf during the night of that day, and that it was there destroyed by fire on the afternoon of the next day, which was Sunday. There was a contract for the through carriage of freight between the defendant and a railroad company. The defendant's line terminated at New London, where the railroad line commenced. The depot where the goods were stored was the place designated for the delivery of goods from the defendant to the railroad company.

The court said: "Upon a careful and deliberate consideration of it [the evidence], we are satisfied that it did not satisfy the jury in finding a contract to carry the wool to Stafford, alone, or in company with the northern road; and that it does show an actual delivery to that road, as an independent and next carrier in a line, and a performance of all that the defendants impliedly undertook to do." Where the shipper accepts a special contract, it is no answer that he did so without knowledge of its terms. He knew he was executing some kind of a contract, and in the absence of fraud or imposition, he must examine it at his peril. See Squire v. N. Y. Central R. Co. 98 Mass. 239; Bostwick v. B. & O. R. Co. 55 Barb. 137; Lewis v. Great Western R. Co. 5 H. & N. 867; Blossom v. Dodd, 43 N. Y. 264, where it was said: "As to bills of lading and other commercial instruments of like character, it has been held that the persons securing them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. Belger v. Dinsmore, 51 N. Y. 166; McMillan v. M. S. & N. I. R. Co. 16 Mich. 80; Kallman v. U. S. Ex. Co. 3 Kan. 205; Mulligan v. Ill. Cent. R. Co. 36 Iowa 181.

The same rule was applied to a passenger ticket in Steers v. Steamboat Co. 57 N. Y. 1. M. A. L.

CONSTRUCTION OF WILLS—ESTOPPEL IN PAIS.

BRANT v. THE VIRGINIA COAL AND IRON CO. *ET AL.*

Supreme Court of the United States, October Term, 1876.

1. BEQUEST TO WIFE—CONSTRUCTION.—Where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with, as she sees proper before her death," it was *held* that the wife took a life-estate in the property with only such power as a life-tenant can have; and that her conveyance of the real property passed no greater interest.

2. EQUITABLE ESTOPPEL—WHAT CONSTITUTES.—For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury.

3. AS RELATING TO REALTY.—Where the estoppel relates to the title of real property, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

Mr. Justice FIELD delivered the opinion of the Court:

In April, 1831, Robert Sinclair, of Hampshire county, Virginia, died, leaving a widow and eight surviving children. He was, at the time of his death, possessed of some personal property, and the real property in controversy, consisting of one hundred and ten acres. By his last will and testament he made the following devise: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal; that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The will was duly probated in the proper county.

In July, 1839, the widow, for the consideration of eleven hundred dollars, executed a deed to the Union Potomac Company, a corporation created under the laws of Virginia, of the real property thus devised to her, describing it as the tract or parcel on which she then resided, and the same which was conveyed to her "by the last will and testament of her late husband." As security for the payment of the consideration, she took at the time from the company its bond and a mortgage upon the property. The mortgage described the property as the tract of land which had on that day been conveyed by her to the Union Potomac Company. In 1854 this bond and mortgage were assigned to the complainant, Daniel Brant, and Hector Sinclair, the latter a son of the widow, in consideration of one hundred dollars cash, and the yearly payment of the like sum during her life. Previous to this time, Brant and Hector Sinclair had purchased the interest of all the other heirs, except Jane Sinclair, who was at the time, and still is, an idiot or an insane person; and such purchase is recited in the assignment, as is also the previous conveyance of a life-interest to the company. In July, 1857, these parties instituted suit for the foreclosure of the mortgage and sale of the property. The bill described the property as a tract of valuable coal land which the company had purchased of the widow, and prayed for the sale of the estate purchased. Copies

of the deed of the widow and the mortgage of the company were annexed to the bill. In due course of proceedings a decree was obtained directing a sale, by commissioners appointed for that purpose, of the property, describing it as "the lands in the bill and proceedings mentioned," if certain payments were not made within a designated period. The payments not being made, the commissioners, in December, 1858, sold the mortgaged property to one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company.

The defendant corporation, the Virginia Coal and Iron Company, derive their title and interest in the premises by sundry mesne conveyances from Hammill, and in 1867 went into their possession. Since then it has cut down a large amount of valuable timber, and has engaged in mining and extracting coal from the land and disposing of it. Brant, having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal from the land, and to compel an accounting for the timber cut and the coal taken and converted to its use.

The disposition of the case depends upon the construction given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings as an estoppel upon the complainant from asserting title to the property. The complainant contends that the widow took a life-estate in the property with only such power as a life-tenant can have, and that her conveyance, therefore, carried no greater interest to the Union Potomac Company. The defendant corporation, on the other hand, insists that with the life-estate the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life-estate. The language used admits of no other conclusion. And the accompanying words, "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. These words, used in connection with the conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected.

In the case of Bradly v. Westcott, 13 Vesey, 445, the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free and absolute disposal and disposition during life; and the court held that, as the testator had given in express terms an interest for life, the ambiguous words afterwards thrown in could not extend that interest to the absolute property. "I must construe," said the master of the rolls, "the subsequent words with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have." In Smith v. Bell, 6 Peters, 68, the testator gave all his personal estate, after certain payments, to his wife, "to and for her own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former, and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice Marshall, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said: "But suppose the testator had added the words, 'during her natural life;' these words would have restrained those which preceded them, and have limited the use and benefit and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words, 'disposal absolutely,' may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make." The chief justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life; and that the words, devising a remainder to the son, were thus equivalent. In Boyd v. Strahan, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator, not otherwise disposed of, "to be at her own disposal and for her own proper use and benefit during her natural life," and the court held that the words, "during her natural life," so qualified the power of disposal as to make it mean such disposal as a tenant for life could make. Numerous other cases to the same purport might be cited. They all show that, where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended.

The position that the complainant is estopped, by proceedings for the foreclosure of the mortgage, from asserting title to the property, has less plausibility than the one already considered. There was nothing in the fact that the complainant and Hector Sinclair owned seven-eighths of the reversion, which prevented them from taking a mortgage upon the life-estate, or purchasing one already executed. There was no misrepresentation of the character of the title which they sought to subject to sale by the foreclosure suit. The bill of complaint in the suit referred to the deed from the widow to the Union Potomac Company, and to the mortgage executed to secure the consideration; and copies were annexed. As already stated, the deed described the property sold as the tract conveyed to the widow by the last will and testament of her late husband. The mortgage described the property as the tract of land conveyed on the same day to the mortgagor. The decree ordering the sale described the property as "the lands in the bill and proceedings mentioned." The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of *caveat emptor* applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed; and here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterwards. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title, inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record, that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned and had sold to that company a life-interest in the property, and that they had acquired the interest of the heirs.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be

estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down, by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1st Story's Equity, 391. To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." Hill v. Epley, 31 Penn. St., 334; Henshaw v. Bissell, 18 Wall. 271; Biddle Boggs v. Merced Mining Co., 14 Cal. 368; Davis v. Davis, 26 *Id.* 23; Commonwealth v. Moltz, 10 Barr, 531; Copeland v. Copeland, 28 Me. 539; Delaplaine v. Hitchcock, 6 Hill, 14; Hawes v. Marchant, 1 Curtis C. C. 136; Zuchtmann v. Roberts, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

There are undoubtedly cases where a party may be concluded from asserting his original rights to property, in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefit. But such cases are generally referable to other principles than that of estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated.

It is also essential for its application with respect to the title of real property, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Crest v. Jack, 3 Watts, 240; Knouff v. Thompson, 4 Harris, 361.

Tested by these views, the defence of estoppel set up in this case entirely fails. The decree of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

NOTE.—The foregoing opinion lays down the doctrine of estoppel *in pais* with more clearness and precision than have characterized some of the opinions of that able court on that subject. In our opinion, the limits prescribed in this case can not safely and justly be exceeded. Within proper bounds, the doctrine of equitable estoppel is most wise, just and equitable; but, carried too far, it becomes harsh, unjust and inequitable to the last degree, and may well be characterized as *odious*. Some courts seem to regard the term "estoppel *in pais*" as a sort of patent medicine for nearly all the complicated ills the law is heir to. It is frequently applied to the ratification of an invalid sale by the acceptance of the purchase-money, a case as wholly destitute of the essential elements of an estoppel *in pais* as can well be imagined. The doctrines of ratification and estoppel are so radically different, that it is surprising that they should have been so often confounded by courts of learning and ability. The same may be said of the maxim so often applied in such cases, that, where one of two innocent persons must suffer, he shall suffer who, by his acts, occasioned the confidence and loss. The indiscriminate application of this maxim, as equivalent to an estoppel *in pais*, has led to much confusion and uncertainty, both in the application of the maxim and of the doctrine of estoppel *in pais*. They are properly applicable to a very different class of cases, and are in no proper sense equivalent. The very essence of an estoppel *in pais* is the culpability of the party estopped. It can not arise between two innocent parties. It is not essential to the estoppel that the party intended to deceive or mislead; but, in the absence of positive fraud or concealment, there must be negligence so gross as to amount to constructive fraud. One who asserts the existence of a fact without having reasonable grounds to believe in its existence, knowing that another may act upon such assertion, stands in no better position, should the assertion prove untrue, than one who knowingly asserts a falsehood. But mere negligence, not showing a reckless disregard of the rights of others, is not sufficient to create an estoppel. A certain degree of negligence is a luxury that all are licensed to enjoy, and for which every man must make allowance in his dealings with other men.

In a recent article on "Estoppel by Conduct as Affecting Title," 2 Southern Law Review, N. S. 644, it is strongly urged that the rule laid down by Lord Eldon in Evans v. Bicknell, 6 Ves. 182, and followed in this country in Dezell v. Odell, 3 Hill, 215, confined the estoppel within too narrow limits. We think both cases are entirely in harmony with the doctrine stated in the principal case. We do not understand those cases to hold that there must be "some active personal influence used by one party to induce the other to act." There is a homely old maxim that silence sometimes speaks louder than words. He who keeps silent when, in good conscience, he ought to speak, is as much guilty of fraud as one who willfully speaks falsely. It is contended by the same writer that "the idea of some fraudulent intent in the mind of the party, when the representation or admission was made on which another acted, has pervaded the cases," and that "this has produced, in many places, a confusion in the minds of many regarding this kind of estoppel." And it is further said that "this idea was prominent in the elaborate decision of Field, J., in California, in the case of Boggs v. Merced Mining Co., 14 Cal. 279;" but it is contended that Mr. Justice Field abandoned this doctrine in Henshaw v. Bissell, 18 Wall. 271, where he said, referring to an estoppel *in pais:* "For its application, there must be some intended deception in the conduct or declarations of the party to be estopped, or *such gross negligence* on his part as to amount to constructive fraud." This remark is not only consistent with the doctrine of Boggs v. Merced Mining Co., but it is almost in the very language used by Lord Eldon in Evans v. Bicknell, where it was said: "If, then, the cases go to this only, that there must be positive fraud or concealment, *or negligence so gross as to amount to fraud*, is there in this case evidence resting upon that high degree of probability upon which the court, guided by its conscience, must act, that this trustee had a fraudulent purpose? If not, is there negligence so gross as to amount to constructive fraud?—as Chief Justice Eyre expresses it in Plumb v. Fluitt, 2 Anstr. 432, such evidence of fraud, that he shall not be heard, in a court of justice, to say there was no fraud?"

In the article in the Review before referred to, it is said that "it is not so much the *intention* of the party estopped, as the *effect* upon the party setting up the estoppel." And again: "There is no doubt that, as the authorities now are, there need not necessarily be fraud, or bad faith by the party estopped; the main test is, would it work a fraud, if the estoppel were not upheld?" The soundness of the first proposition may well be questioned. It is only material in such an inquiry to ascertain that the party setting up the estoppel has been or would be damaged, without fault upon his part; that is the effect, and only effect, requisite. But

it must also be made to appear that the injurious effect was the proximate result of some culpable action upon the part of the party against whom the estoppel is sought to be enforced. The effect of a given act can not, without more, make it wrongful. Only wrongful acts resulting in injury to another, who is himself without fault contributing thereto, create an estoppel. A right action has never yet been held to raise an estoppel. As to the latter of the propositions above cited, it seems to us that the "main test" is no test at all. It may well be admitted that the estoppel should be upheld, where it would work a fraud not to uphold it. But the fraud must certainly be upon the part of him whose act creates the estoppel. The real inquiry, it seems to us, is, can the party repudiate his statement, or the natural inference from his conduct, without showing that he has been guilty of deceit, or of negligence so gross as to raise a presumption that he was regardless of the rights of others? If he can not, and damage would result to one who might rightfully rely upon such statement or course of action, on account of such confidence, then he should be estopped from making such denial.

It is not necessary to the creation of an estoppel, however, that there should, in fact, have been an intent to deceive; for the party may have acted innocently through mistake of law; but that will be his misfortune. Public policy forbids that he should be permitted to say that he did not know the law. And this is not confined to one party alone. The party who sets up the estoppel must himself know the law, at his peril. But it seems that an act done in submission to supposed legal authority can not work an estoppel. Jersey City v. State, 30 N. J. L. 521. See, however, The Town of South Ottawa v. Perkins, 4 Cent. L. J. 132. In Snyder v. Studebaker, 19 Ind. 462, where a party had conveyed land to a corporation, which had in turn conveyed it to a third party, it was held that the party who conveyed to the corporation was estopped as against its grantee to set up that the corporation was not duly organized, although it was said that he might show that there was no valid law which authorized the supposed corporation; and, as it appeared that there might have been an organization under the act which created the corporation, before the taking effect of a constitutional provision making the act void, if it had not been accepted before that time, the party so conveying to the corporation would be estopped to say that the grant of power to organize had not been accepted in time to keep it in force. It has often been said that one who contracts with a corporation, as such, is estopped to set up the invalidity of the corporation in a suit on an obligation so created, even as against the corporation itself. But it would seem that the doctrine of equitable estoppel has no application to a case of this kind. It can not be properly said that one who deals with a corporation, as such, in any way misleads the corporation or its members as to the regularity or validity of its creation or organization. This class of decisions is clearly right in the result reached; but other and better reasons might be assigned to support them. In a case where the validity or invalidity of the corporation would affect any substantial right of the other contracting party, we think he should be permitted to show that the corporation is not legally in existence. In all other cases the inquiry should be left to the state. An estoppel can never properly be invoked in aid of oppression or fraud, or where it would work injustice.

The rule, that one claiming to have been misled to his injury by the conduct or statements of another must show that he was himself without knowledge on the subject, was enforced with much strictness in all the earlier cases; and, while the modern cases have generally conceded the rule, it has sometimes been practically ignored. In Pasley v. Freeman, 3 T. R. 51, Lord Kenyon, referring to representations respecting the title to real-estate, said: "A person does not have recourse to common conversations to know the title of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security."

M. A. L.

In Manby v. Scott, (1 Sid. 109; 2 Smith L. C. 422, 6th London, Ed.), among the reasons for the second "point there established," it is said: "In the Spiritual Court such bad women as have violated their vows shall have such provision as clerks' convicts (Staunforde, 140), and shall be fed with the bread of affliction and the water of adversity."

BOOK NOTICES.

PROFFATT ON PRIVATE CORPORATIONS.—The Law of Private Corporations, under the civil code of California, with the recent amendments and statutes, and annotations in reference to the decisions of the Supreme Court of California and of other states, on analogous provisions; also an introductory chapter on the History of Private Corporations, and an appendix with forms, by JOHN PROFFATT, LL. B., author of "Curiosities and Law of Wills," "Jury Trial," etc. San Francisco: A. L. Bancroft & Co. 1876. pp. 227.

The growth of corporate effort in the United States, says the author in his introduction to this work, is truly marvelous; nothing is too trifling for its object, nor anything too vast for its undertaking. From the manufacture and sale of a simple attachment to a lockspring, to the mighty enterprise of uniting the waters of two oceans, men combine their efforts and capital, under the protection and powers of a corporation. Interests and privileges that were formerly confined to a select and limited number, are now so generally extended that there are but few business men who are not in some way interested in a corporate undertaking, and among whose assets may not be found some kind of an interest in a corporation solid or chimerical. Corporations, though not to the extent which they have developed in modern times, have existed from a very early period. The existence of bodies possessing these corporate attributes and powers were known both in Greece and Rome, and the incorporated trading associations of early England still exist in that country, in the names and customs of their guilds, if in nothing else. But the corporations of modern times differ from these in both their influence and extent, and it is on this account that the law of private corporations has taken so conspicuous a place in our statutes and decisions. The weightiest matters that come before our tribunals, as the author rightly observes, are for the most part connected in some way or another with corporate rights or relations. The courts of this country are daily invoked to apply the preventative or remedial measures of the law as between the stockholders and the corporation, and the corporation and the public.

There are probably few states in which corporate undertakings are more frequent, and where the laws relating to corporations are so uniform as in the state of California. Three-fourths of the amendments passed at the last session of the state legislature had reference to corporations; the code placing all bodies of this description under one general provision. An annotated edition of the chapters governing these institutions, it will therefore be seen, will be of no inconsiderable value, both to the profession of the Pacific Slope and the practitioner at large. Although the present volume is a small one, it contains the decisions of the various courts outside of that state, construing provisions similar to those which are found in the California code. The introductory chapter on the History of Private Corporations can not be read without profit, and the whole work is a credit to its author, who is known to the profession of the whole country through his larger works.

MAINE REPORTS. VOL. LXV. Reports of Cases in Law and Equity, determined by the Supreme Judicial Court of Maine. By JOSEPH D. PULSIFER, Reporter to the State. Portland, Me.: Dresser, McLellan & Co. 1876.

This is a well-printed and neatly bound volume of over six hundred pages, exclusive of the index, table of cases reported, and table of cases cited. The judges of the supreme judicial court, during the time of these reports, were Hon. John Appleton, Chief Justice, and

Hons. Chas. W. Walton, Jonathan G. Dickerson, Wm. G. Barrows, Charles Danforth, Wm. Wirt Virgin, John A. Peters and Artemas Libby, Associate Justices. The present volume contains over one hundred cases, some of which are of more than ordinary interest and importance. In several of them, which we append, the questions considered have been discussed in an exhaustive manner, and at considerable length.

VOID MARRIAGE—ACTION FOR DECEIT—SURVIVAL.—*Withee v. Brooks, Adm.*, p. 15. Opinion by DANFORTH, J. An action on the case is maintainable by a woman against a man for his deceit, by which she is led into a void marriage with him, and such action, being an action of trespass in the case within the meaning of the statute, survives against his administrator. Fellows v. Emperor, 13 Barb. 92; Hutchinson v. Ham, 1 Smith, 242; Lady Cox's case, 3 P. Wms. 389; Hovey v. Page, 55 Me. 142.

ADULTERY—INTENT.—*State v. Goodenow*, p. 30.—Opinion by PETERS, J. Where a man and woman are jointly indicted for adultery, the female defendant, having a lawful husband alive, can not set up in defense that such husband had been married again, and that, on that account, they supposed they could lawfully marry, and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith. It was urged, on the part of the defendants, that these facts showed the absence of a guilty intent. The court said that it was true that the crime of adultery can not be committed without a criminal intent; but the intent may be inferred from the criminality of the act itself. Lord Mansfield states the rule thus: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent." In this case the accused had intentionally committed an act which is in itself unlawful. In excuse for it they pleaded their ignorance of the law. But ignorance of the law excuses no one. The law, which the respondents are conclusively presumed to have known as applicable to their case, is well settled, and free from all obscurity or doubt. They are bound as if they knew the law. Late cases furnish some interesting discussion upon this subject. Cutter v. State, 36 N. J. 128; U. S. v. Anthony, 11 Blatch. 200; U. S. v. Taintor, *Id.* 374; 2 Green's Crim. Law Rep. 218, 244, 275, 589; Black v. Ward, 27 Mich. 191, s. c., 15 Am. Law Rep. 162, and note 171. The rule, though productive of hardship in particular cases, is a sound and salutary maxim of the law. Nor can the gross ignorance of the magistrate excuse them. They were guilty of negligence in taking his advice. They were bound to know or ascertain the law at their peril. See Com. v. Elwell, 2 Metc. 190; Com. v. Farren, 9 Allen, 489; Com. v. Goodman, 97 Mass. 117; Com. v. Emmons, 98 Mass. 6; Com. v. Mash, 7 Metc. 472; Com. v. Thompson, 6 Allen, 591, 11 Allen, 23.

EVIDENCE—TESTIMONY OF EXPERTS.—*State v. Watson*, p. 74.—Opinion by BARROWS, J. Upon the trial of an indictment for arson of farm buildings, where it was a material question whether fire was communicated from one building to another, it was *held*, 1, that the opinion of an experienced city fireman upon the question whether, under all the circumstances, the fire would be thus communicated, is not competent evidence; 2, that the defendant has no cause of complaint because he is not allowed to ask such witness whether or not it is a common occurrence for fire to be communicated from leeward to windward across a space greater than that which separated the buildings burned; 3, that such witness can not be asked whether, in his experience, large wooden buildings or large fires make their own currents, frequently eddying against the prevailing wind. There is nothing in the knowledge or experience of a city fireman, as to the influence of the wind in directing the course of a fire from one building to another in an open country, or as to fires creating their own currents, that qualifies him to give evidence as an expert. In the class of cases where the opinion of a witness is competent evidence, it becomes so, not because the witness may be supposed, when compared with the jury, to possess superior powers of perception, intuition and judgment, or superior ability to draw correct inferences from proved facts, but because the nature of the question at issue is such that men of ordinary experience and intelligence must be supposed to be incapable of drawing conclusions from the facts in evidence, without the assistance of some one who has special skill or knowledge in the premises. Jefferson Ins. Co. v. Cotheal, 7 Wend. 73. Hence it follows that, where an inference is to be drawn respecting matters which may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. N. E. Glass Co. v. Lovell, 7 Cush. 319. Accordingly, in the last-named case, where it became material to determine whether certain packages of glassware were stowed on or under the deck of a vessel which was stranded on Hart Island, and the plaintiffs offered evidence to show that, if they had been stowed under deck, they or the remains of them would have been found there, and the defendants offered evidence tending to show that they might have been washed out, the opinion of a witness who had been acquainted with the navigation about there for thirty years, and had been stranded there, and had been employed in saving and getting off wrecked vessels, and was near the place at the time of the wreck, upon the question whether, taking into view all the circumstances, the goods could have been broken to pieces in the hold, or washed out of the hold, as the defendant contended, was held inadmissible. In Jefferson Ins. Co. v, Cotheal, *supra*, witnesses long and familiarly acquainted with the business of insurance, were not allowed to give their opinion as to the materiality of a representation or concealment, nor whether the risk had been increased by the erection of a boiler-house adjoining the premises covered by the insurance. In Joyce v. Maine Ins. Co., 45 Me. 168, and Cannell v. Phœnix Ins. Co., 59 Me. 582, the opinions of witnesses, who had had large experience in the business of insurance, as to the comparative risk upon occupied and unoccupied dwelling-houses, and their testimony as to the fact that rates of insurance were increased when dwelling-houses were vacant, and as to the relative number of losses upon occupied and unoccupied buildings, were all held inadmissible. On the argument, the counsel cited the following cases where the opinion of experts had been admitted: An observer of the habits of certain fish, in overcoming obstructions in the ascent of rivers—Cottrill *et al.* v. Myrick, 12 Me. 222; a seaman, as to the proper storing of a cargo—Price v. Powell, 3 Comst. 322; a mason, as to the time requisite for the walls of a house to become so dry as to become safe for human habitation—Smith v. Gugerty, 4 Barb. 614; a master engineer and builder of steamboats, as to the manner of a collision—18 Ohio, 375; a practical surveyor, as to whether piles of stones and marks on trees were monuments or boundaries—Davis v. Mason, 4 Pick. 156.

NUISANCE—REMOVAL OF—DESTRUCTION OF BY MOB.—*Brightman v. Inhabitants of Bristol*, p. 426.—Opinion by APPLETON, C. J. This was an action under the statute to recover three-fourths of the value of a porgy oil factory, which had been burned and destroyed by a mob. On the trial, the defendants' counsel offered to show that strong and offensive odors arose from the plaintiff's factory, and that it was a public nuisance to all residing in the vicinity; but evidence of this was excluded. On appeal, the ruling was affirmed. The court held that, when an erection itself constitutes a nuisance, as a building in a public street, obstructing its safe passage, its removal or destruction may be necessary for the abatement of such nuisance; that when the nuisance consists in the wrongful use of a building, harmless in itself, the remedy is to stop the use; that when the act done, or the thing complained of, is only a nuisance by reason of its location, and not in and of itself, the court will not order the destruction of what constitutes the nuisance, but will require its removal, or cause its use, so far as such use is a nuisance, to cease; *but no law sanctions its destruction by a mob.* A smith's forge, in Bradley v. Gill, Lutw. 29; a tobacco mill, in Jones v. Powell, Hut. 136; a manufactory for spirits of sulphur, in White's case, 1 Burr. 333; a distillery, in Smith v. McConathy, 11 Miss. 517; a slaughter-house, in Brady v. Weeks, 3 Barb. 157; a livery stable, in Coker v. Birge, 10 Ga. 336; a melting-house, Peck v. Elder, 3 Sandf. 126; a gaming-house or grog-shop, in State v. Paul, 5 R. I. 185; a powder magazine, in Cheatham v. Shearon, 1 Swan, 215; a blacksmith's shop, in Norcross v. Thoms, 51 Me. 503; a tallow factory, in Allen v. State, 34 Tex. 230; a tannery, in Rex v. Papineau, 1 Strange, 686, have been declared nuisances because of their unsuitable location; but that will not justify a riotous mob in burning and destroying them. A tomb erected on one's own land is not necessarily a nuisance; but it may become such from its location. Barnes v. Hathorn, 54 Me. 125. But it is not, therefore, to be destroyed. Its use may be prohibited. The plaintiff's porgy oil factory stood upon the same

ground. These views are sustained by an almost unbroken line of decisions. In Rex v. Papineau, *supra*, the defendant was indicted for a nuisance by reason of his tannery, and fined £100. A writ of error was brought, and one of the reasons given for its reversal was, "that the judgment was erroneous for want of an adjudication that the nuisance be abated." "But," said Lord Raymond, "regularly the judgment ought to be, to abate so much of the thing as makes it a nuisance. * * * If a dye-house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on." In the same case, Reynolds, J., says: "Roasting of coffee was formerly thought a nuisance, and yet nobody ever imagined the house in which it was roasted should be pulled down." Then, referring to the tannery, he adds: "I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some skins." See also Barclay v. Commonwealth, 25 Penn. 503. In Welch v. Stowell, 2 Doug. (Mich.) 332, an action of trespass was brought for the destruction of a house of ill fame by the city marshal of Detroit, acting in pursuance of a city ordinance authorizing him to proceed with sufficient force and demolish the same. "It is said," said Whipple, J., in delivering the opinion of the court, "that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill fame. That which constitutes or causes the nuisance may be removed; thus, if a house is used for the purposes of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business; so a house in which gaming is carried on to the injury of the public morals, the individuals by whom it is occupied may be punished by indictment, and the implements of gaming removed; and a house in which indecent pictures are exhibited is a nuisance which may be abated by a romoval of the pictures. Yet, in this and the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that, to suppress the nuisance, such an act was unnecessary. So, in the case before us, the nuisance was not caused by the erection itself, but by the persons who resorted there for the purposes of prostitution." In Moody v. Supervisors of Niagara County, 46 Barb., 639, an action was brought for the destruction of a bawdy-house which was likewise the resort of thieves, robbers and murderers, and it appeared that, immediately before its destruction, one of the police was murdered by the people congregated there. It was held that the fact that the house is kept as a house of public prostitution renders it a common nisance, but that a house can not be lawfully destroyed by a mob because, for the time being, it is devoted to a purpose which the law characterizes as a common public nuisance; when it is the unlawful use of a building that constitutes a nuisance, the remedy is to stop such use and not to tear down the building. In Gray v. Ayres, 7 Dana, 375, the court expressed a like opinion. In Ely v. Supervisors of Niagara Co., 36 N. Y. 297, a similar case of the destruction of a house of ill fame came before the court. "The property of the plaintiff was not beyond the pale of the law's protection," said the court, "by her detestable and criminal conduct. She still had the right to expect and rely implicitly upon the zeal and ability of the proper officers to defend her house and furniture against the unlawful efforts of any public indignation her evil practices might provoke." The same views are fully sustained in Massachusetts by the opinion of Shaw, C. J., in Brown v. Perkins, 12 Gray, 89, and in Rhode Island, by that of Ames, C. J., in State v. Paul, 5 R. I. 185. In Underhill v. Manchester, 44 N. H. 214, a suit was brought by a saloon-keeper against the defendant town for damages caused by the destruction of plaintiff's property by a mob. The court held that he could not recover because his business led to drunkenness and disorder; and, by the provisions of the act making cities and towns liable for damages caused by mobs or riots, it was provided that no persons were entitled to recover, the destruction of whose property was caused by their illegal or improper conduct. Its decision is placed entirely upon the peculiar language of the statute. Doe, J., in his opinion, however, says that "the rioters are liable to the plaintiff for the damage done by them. His property, though solely used in violation of law, could not be lawfully destroyed except under process of law. Brown v. Perkins, 12 Gray, 89; Woodman v. Hubbard, 25 N. H. 67." In Spalding v. Preston, 21 Vt. 9. an action of trover was brought for counterfeit coins partly finished, against the sheriff by whom they had been seized under process, and detained to be used as evidence upon the trial of an indictment against the person in whose possession they were found, and likewise to prevent their being put in circulation; but the court held that the action was not maintainable. "Such property," remarks Redfield, J., "so to speak, is outlawed, and is common plunder." Counterfeit money is *per se* unlawful, but porgy oil is an article of commerce, and its manufacture an honest and lucrative industry. In Mecker v. Van Rensselaer, 15 Wend. 397, the destruction, by individuals, of a dwelling-house during the prevalence of the Asiatic cholera, which was cut up into small apartments inhabited by poor people in a filthy condition, and calculated to breed disease, was sanctioned on the ground that it was a nuisance, and "that there was no other way to correct the evil but by pulling down the building." But this case has been doubted in Welch v. Stowell, 2 Mich. 332, and in a subsequent case in New York the court say that it can only be sustained upon the ground, that in no other way could the safety of the people be preserved. In Lord v. Chadbourne, 42 Me. 429, a suit was brought for the value of liquors kept for sale in violation of the statutes of the state; and it was held not maintainable, among other reasons, because by statute the *status* of the liquors was illegal. Not so in this case. The plaintiff was engaged in a lawful bnsiness. If the place of his manufacturing was improper, that was to be determined by a jury, not by a mob of men in disguise. And, see Sherman v. Fall River Iron Works, 5 Allen, 218.

PREVIOUS CONVICTION AS EVIDENCE OF INTENT—DOCKET ENTRIES.—*State v. Neagle*, p. 488. Opinion by WALTON, J. Upon the trial of one charged with having in his possession intoxicating liquors, with intent to sell the same in violation of law, the record of a previous conviction of a similar offense is admissible in evidence upon the question of intent. State v. Plunkett, 64 Me. 534. And the docket entries may be read to the jury, when a more extended record has not been made. Leathers v. Cooley, 49 Me. 337; Pierce v. Goodrich, 47 Me. 173; Longley v. Vose, 27 Me. 179; Read v. Sutton, 2 Cush. 115; Pruden v. Alden, 23 Pick. 184.

RAILROAD—KILLING ANIMALS—FENCES—NEGLIGENCE—PAROL AGREEMENT.—*Wilder v. Maine Central R. R.*, p. 332.—Opinion by DICKERSON, J. 1. The statute requiring railroad corporations to enclose the land, taken for their road, with fences, is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory as such upon all railroad corporations, whether chartered before or after its passage. State v. Noyes, 47 Me. 189; Ind., etc., R. R. v. Townsend, 10 Ind. 28; 1 Red. on Railways, 493, 494. 2. A parol agreement for the removal or discontinuance of a fence on the line of a railroad, between the owner of the land and the railroad company, does not run with the land, and can not therefore bind his grantee. Gilman v. Eur. & N. A. R. R. Co., 60 Me. 235; St. L. & A. R. R. Co. v. Todd, 36 Ill. 409. 3. Where a horse escaped from his owner's land to an adjoining railroad track and was killed by the company's locomotive; *held*, that the mere fact of his turning his horse upon the land where there was no fence between it and the railroad, when it was the legal duty of the railroad company to build it, was not proof of contributory negligence on his part. The owner of land has a right to use it in a natural and ordinary way for the purposes for which it is fit. This right does not depend upon the performance or non-performance of any duty or obligation enjoined by law upon another in respect to his land. He has a right to expect that the requirements of law will be complied with, and to act accordingly; nor does his knowledge that they have not been, affect his right of use, one way or the other. If it did, the neglect of another to obey the law might operate to prevent him from the lawful use of his own property. The common law made it the duty of the owner of the land to guard against the escape of his cattle therefrom; but the statute devolves this duty upon the railroad company in the case under consideration, and the rights of the parties must be determined in accordance with this change. To hold the land-owner to the same care of his cattle as the common law required, would be to disregard the statute, and render it inoperative. It was for the defendants to use the necessary care to prevent the escape of the plaintiff's horse on account of their neglect to build the fence. Shear. & Red. on Neg. § 471. In Rogers v. Newburyport R. R. Co., 1 Allen, p. 17, which was tort for the loss of a colt run over by the defendants' cars, the court say: "The plaintiff had a right to place his colt in his pasture to feed,

and was under no obligation to the defendants to use any care to prevent escape by reason of their neglect to maintain the fence. It was for them to use the necessary care to prevent such an escape." Gardner v. Smith, 7 Mich. 410. In McCoy v. Cal. & Pac. R. R. Co., 40 Cal. 532, the line of the road was not fenced where it passed through the field occupied by the plaintiff, and the live stock of the plaintiff running in this field strayed on to the road and were killed by the defendants' train; and the court held that these facts made out a *prima facie* case against the defendants, and also, that the plaintiff was not guilty of contributory negligence from the fact that he knew that the road was not fenced when he turned his cattle into the field. Kellogg v. Ch. & N. W. R. R. Co., 26 Wisc. 223.

MISNOMER—WRIT OF ATTACHMENT.—*Dutton v. Simmons*, p. 583.—Opinion by PETERS, J. The certificate by an officer to the register of deeds of the attachment of the real estate of Henry "M." Hawkins, when the name of the defendant in the writ is Henry "F." Hawkins, is such a misdescription of the person sued as will render the attachment void. Formerly, but one Christian name was known to the law. The omission or insertion of a middle name or its initials was regarded immaterial. Such is probably the law of the Supreme Court of the United States, and of many, if not most, of the state courts in this country at the present day. Games v. Stiles, 14 Pet. 322; People v. Collins, 7 Johns. 549. But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this state and Massachusetts the old doctrine must be regarded by the precedents and practice as overruled. In Bishop's Crim. Law, Misnomer, may be found cited many cases upon the question *pro* and *con*. The English courts have also long since departed from the old rule, under the influence of some of their statutes of amendment. In Com. v. Hall, 3 Pick. 262, "Charles" Hall and "Charles James" Hall, are regarded as different names. Com. v. Shearman, 11 Cush. 546, decided that "George" Allen and "George E." Allen are not the same name. "Nathan" Hoard and "Nathan S." Hoard, are not the same name. Com. v. McAvoy, 16 Gray, 235. There are many more Massachusetts cases either directly or indirectly supporting the same view. In Maine, State v. Homer, 40 Me. 438, and State v. Dresser, 54 Me. 569, are to the same effect. It is also with us well settled that a person's middle name may be represented by its initial letter, instead of writing the name in full. This is almost a universal practice. There was a distinction in some of the English cases depending on the fact whether the middle initial was a vowel or not. If it was, it was regarded as a name of itself. But if a consonant, it was not a name. This nice distinction was grounded upon the idea that a vowel can be sounded by itself, but that a consonant can not be sounded without the aid of a vowel. But this attempted distinction did not receive much recognition in the courts of that country, and has received none in the American courts, that we are aware of. Arbouin v. Willoughby, 1 Marsh. (E. C. L.), 477; Lindsey v. Wells, 3 Bing. N. C. 777; Reg. v. Dale, 17 Ad. & E. 63; Kennersley v. Knott, 7 M. G. & S. 980; Reg. v. Avery, 18 Ad. & E. 576; Kelly v. Laws, 109 Mass. 395. It was claimed in this case that the name was described in the return with substantial correctness, and that the error was one of inaccuracy only, and not fatal to the validity of the attachment. Had the error been in the omission of the middle letter (as if written Henry Hawkins), or if only the initial of the Christian name had been written, but correctly given (as H. F. Hawkins), the omission might have been supplied by parol proof. A person may have different names by reputation. Proceedings have been sustained in important cases where a person was described in either one or the other of the above ways. State v. Taggart, 38 Me. 298; Hubbard v. Smith, 4 Gray, 72; Collins v. Douglass, 1 Gray, 167; Com. v. Gleason, 110 Mass. 66; Reg. v. Avery, *supra*. But those are cases where the description of the person is said to be inaccurate or incomplete only. Campbell, C. J., in one of these cases, says: "It may be said, initials are a short way of stating the Christian name." But the description of Hawkins in the officer's return was not a diminished one, correct as far as it went, and inaccurate merely, but it was essentially and positively false. It may have been caused by a slip of the pen; but as there is no power of amendment in the case, there is no remedy; it is not a misdescription so patent upon the face of the papers as to correct itself. Nye v. Drake, 9 Pick. 35; Litchfield v. Cudworth, 15 Pick. 23; Slasson v. Brown, 20 Pick. 436; Com. v. Mehan, 11 Gray, 321; Frost v. Paine, 12 Me. 111.

DEFECTIVE WAY—WHEN TOWN LIABLE FOR DAMAGES CAUSED BY FRIGHT OF HORSE AT OBSTRUCTION.—*Card v. City of Ellsworth*, p. 547.—Opinion by PETERS, J. The plaintiff, a female, was driving along the highway, when her horse became frightened at a large rock, dug out of the earth by the town and left in the traveled way in a situation calculated to frighten horses passing by. In attempting to dismount from the wagon, she fell and was injured. *Held*, 1, that if (according to the plaintiff's version) she was dismounting to prevent upsetting while the horse was restless and unmanageable from the fright, the defect in the way was the proximate cause of the injury; citing Lund v. Tyngsboro, 11 Cush. 563; Page v. Bucksport, 64 Me. 51; Bigelow v. Reid, 51 Me. 325; Lake v. Milliken, 62 Me. 240; but, if (according to defendant's version) the horse was unmanageable, and the plaintiff was dismounting to lead it by, when it started and threw her down, but not on account of any fright at that moment at the rock, the defect in the way could not be considered as the proximate cause of the injury. 2. A second and important question in the case was, whether the defendants were liable for an injury occurring from the fright of the horse at the rock—neither the horse nor the carriage coming in collision or contact with the rock. Upon this point, say the court, the weight of authority is with the plaintiff, in New Hampshire, Vermont, Connecticut, and several other states. Bartlett v. Hooksett, 48 N. H. 18; Morse v. Richmond, 41 Vt. 435; Dimock v. Suffield, 30 Conn. 129; Ayer v. Norwich, 39 Conn. 376; Foshay v. Glen Haven, 25 Wis. 288; Red. & Shear. on Neg. 61; Angell on Highways, 261. The inclination of the Massachusetts courts, as exhibited in the earlier cases, was apparently favorable to the same view. In Howard v. North Bridgewater, 16 Pick. 189, the court say: "But there may be such obstructions out of the traveled path as will render the road unsafe, such, for instance, as would frighten horses." But, in the later cases, the opinion of that court upon the exact question presented here, as well as upon other questions more or less like it, has been most unequivocally the other way. In Keith v. Easton, 2 Allen, 552, it was decided that an incumbrance "upon the side of a way" was not a defect in the way, merely because it exposes the traveler's horse to become frightened by the sight of it, or by sounds or smells issuing from it. In Kingsbury v. Dedham, 13 Allen, 186, the application of the same doctrine was extended to a case where the object at which the horse took fright was in the traveled way, and was of a nature calculated to frighten horses, but was not *per se* an actual defect or incumbrance in the way of travel. In Cook v. Charlestown, 98 Mass. 80, it was held that the town was not liable, even though the incumbrance at which the horse became frightened was in the traveled part of the way, and was of itself an obstruction and defect therein. There was in that case no collision with the obstruction itself, and the accident occurred at a point in the road where there was no defect. Cook v. Montague, 115 Mass. 571, is to the same effect. Still, individuals who leave or maintain upon the highways obstructions which caused fright in horses, are held, in Massachusetts, responsible to travelers for injuries occasioned thereby. Barnes v. Chapin, 4 Allen, 444; Jones v. Housatonic Railroad Co., 107 Mass. 261. And in the same state it has been held that a town may be answerable for damages where an injury is caused by a horse shying at one defect, and the carriage hitting the same or some other defect upon the highway. Bigelow v. Weston, 3 Pick. 267; Bly v. Haverill, 110 Mass. 520; Woods v. Groton, 111 Mass. 357. In Maine there are but few cases where the question is touched. Cobb v. Standish, 14 Me. 198, is a novel case, where the proposition under discussion is reversed. There the horse was ensnared into a miry pit, instead of being frightened from it. The town was held liable, because the indications of danger were concealed from the notice of the traveler and his horse. It was decided in Merrill v. Hampden, 26 Me. 234, that if a hole in the road was filled up with stones before the accident, so as to be safe for the horse and carriage to pass over, the fact that the horse was frightened at its appearance would not render the town liable for an injury happening on that account. But there it is intimated that there might be conditions in the highway for which a town would be responsible, where an injury is caused by a horse taking fright at the appearance of the road. In Lawrence v. Mt. Vernon, 35 Me. 100, the horse took fright at a pile of shingles on the side of the road, outside the traveled way, and the jury were instructed that, if the shingles were of a character likely to frighten horses, they were a defect in the public way. The court above held that the instruction

withdrew from the jury the determination of a question of fact. In Davis v. Bangor, 42 Me. 522, it was decided that a tree standing upon a cart upon a public way was not an incumbrance for which the town was answerable to a traveler whose horse became frightened and ran away. In that case no notice was taken of any distinction on account of the injury being caused by the fright of the horse at, instead of by a collision with, the supposed defect. Jewett v. Gage, 55 Me. 538, was a case where an individual was held liable for an object in the highway which caused an injury to the traveler by frightening his horse. In Clark v. Lebanon, 63 Me. 393, it was decided that a town is liable where the injury was caused by a horse running away on account of a fright produced by the carriage, to which the horse was attached, coming into collision with a defect in the way. That case strongly resembles the case at bar. There the horse became alarmed through the sense of touch; here through the sense of sight. Each case must depend upon its peculiar facts; and whether a road is or is not out of repair, is a question generally for the jury. But there are certain conditions of a road which can not legally be regarded as defects; such as, because the road is hilly, or not all wrought, or because crowded with persons or teams; and there are other classes of cases where no liability can exist. Illustrations of many such are given in Keith v. Easton, *supra*. It is not, however, true that a recovery can be had in no case where the injury is caused by the fright of a horse at an object upon a highway. Fear is not a despicable quality in the character of man or beast. "Fear has many eyes." "Early and provident fear is the mother of safety." It was fear that impelled the traveler in Lund v. Tyngsboro, *supra*, to leap from his carriage to avoid a dangerous defect in the way, when his safety really depended upon his remaining in the carriage. The passenger who jumped from a coach through fear of his safety, and therefore received an injury, made the same mistake. Ingalls v. Bills, 9 Metc. 1. But in those cases the defect was regarded as the responsible cause of the injury. How far the court would be inclined to admit the doctrine adopted in this discussion, beyond the facts in the case before it, is not now decided. But in no case like this can liability on the part of the town exist, unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should be reasonably expected by the town that it naturally might have that effect, nor unless the horse was, at least, an ordinarily gentle and safe animal, and well broken for traveling upon the public roads.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT to Provide for the Publication of Notices of Intention to Apply to the Legislature, for the Enactment of Local and Special Laws, and to Provide for the Exhibition of the Evidence of such Publication.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. No local or special law shall be passed by the legislature of Missouri, unless notice of the intention to apply therefor shall have been published as hereinafter provided.

SEC. 2. Notice of intention to apply for the enactment of local or special laws shall be published in each county or incorporated city or town to be affected by such local or special law, by advertisement in some newspaper, if there be one published in such county or incorporated city or town; and if there be no newspaper published in such county or incorporated city or town, by posting ten written or printed hand-bills in ten public places in said county or incorporated city or town, one of which shall be posted on the court-house door.

SEC. 3. Such notice shall state the substance of the contemplated law, shall be signed by ten householders of the county or incorporated city or town where the same is published, and shall be inserted in four separate publications of such newspaper, the first insertion of which shall be at least thirty days prior to the introduction of the contemplated bill. Notice given by hand-bills shall be posted at least thirty days prior to the introduction of the contemplated bill; which notice shall be recited in the bill according to its tenor.

SEC. 4. The proof of the publication of such notice shall be made by the affidavit of the publisher of the newspaper in which the same is published, to which shall be attached a copy of the notice. The proof of notice published by hand-bills shall be made by the affidavit of some person who signed the same, to which shall be attached a copy of such notice.

SEC. 5. A copy of the notice required by this act, duly authenticated and proved as herein set forth, shall be attached to the bill before its introduction, and shall be once read in the senate and house of representatives before the bill is put upon its passage.

SEC. 6. The constitution of the state of Missouri, requiring notice of the introduction of local or special bills to be given, and the evidence thereof to be exhibited in the General Assembly before the passage of such bills, and there being no law providing for the publication and proof of such notices, creates an emergency that requires this act to take effect from and after its passage.

SEC. 7. This act to take effect and be in force from and after its passage.

Approved February 7th, 1877.

QUERIES AND ANSWERS.

1. POSSESSION AS NOTICE OF TITLE—MISDESCRIPTION IN DEED.—The article in your issue of the 9th inst., on "Possession of Real Estate as Notice of Adverse Title," suggests this question: In states whose registry laws invalidate unrecorded deeds against subsequent purchasers without notice, what would be the effect of possession under a deed (either recorded or unrecorded), in which the land was totally misdescribed. For instance, A sells to B, misdescribing the land. B records the deed and goes into possession; A subsequently offers to sell the same land to C. The latter, examining the title-books of the county, discovering that A owned and had never conveyed the land, and not knowing that B was in actual possession, makes the purchase. In such a case, can equity reform and correct the mistake in favor of B against C? If so, the registry laws have acted as a snare. Possession is notice of title; but it must be of such title only as the occupant has, and in the case supposed, he has no (legal) title to the land occupied. Possession is also notice of equities; but can it have that effect against the positive provisions of the registry statutes, since, as to the land occupied, no deed has been recorded, nor has the party any such deeds? He is simply occupying without a deed.

[If B's possession was open, notorious, and exclusive, it would seem that C's ignorance thereof was *voluntary*. The presumption is, that a man of ordinary prudence, in purchasing land, will look not only at the records, but at the land, or, at least, will seek some knowledge as to whether it is occupied or unoccupied. Such inquiry would lead inevitably to the knowledge of the possession of B. After this, to fail in making inquiry as to the nature of B's claim on the land, would be negligence in C. Were the facts of the case, that C knew that B occupied a piece of land in the neighborhood, and being misled by the false description in the deed which B had placed upon record, supposed it to be a different tract from that of which A was the apparent owner, the case would be different. They would have equal rights, and the

maxim, "between equal equities, the law will prevail," would apply. The provisions of the registry law *might* be so strongly drawn, as to prevent the constructive notice arising from possession from affecting subsequent purchasers; but we know of no registry law containing such stringent provisions.] W.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

POSSESSION OF PERSONALTY—FALSE RETURN.—Where an agent takes wrongful possession of personal property for his principal, and for the purpose of collecting rent due his principal, and when suit is brought by the owner of the property for its possession against the principal, the officer serving the writ finds the property upon the principal's premises, held for the rent by the agent, it is not a false return of said writ, that he has taken the property from the possession of said principal. Judgment affirmed. Opinion by LEWIS, C. J.—*Continental Bank v. Lidwell.*

CRIMINAL JURISPRUDENCE—HOMICIDE—SELF-DEFENSE—EVIDENCE.—In a prosecution for homicide, where there is evidence tending to show deceased the aggressor, defendant should be allowed to show the violent and dangerous character of deceased. A blow may be repelled before it is received, and may be struck in self-defense when the person is threatened. [Citing State v. Keene, 50 Mo. 357.] Evidence of facts occurring at a time and place distinct from that of the homicide, should have been excluded from the consideration of the jury. Judgment reversed. Opinion by BAKEWELL, J.—*State v. Freeman.*

CONSEQUENTIAL DAMAGES — DAMNUM ABSQUE INJURIA.—An action will not lie against a municipal corporation for consequential damages for injuries resulting from the insufficiency of a sewer, or the peculiar manner in which a street is graded, provided there is neither negligence nor carelessness in the execution of the work. [Citing St. Louis v. Gurno, 12 Mo. 415; Schattner v. City of Kansas, 53 Mo. 162; Imler v. City of Springfield, 55 Mo. 119; Wegmann v. City of Jefferson, 61 Mo. 55; Mills v. City of Brooklyn, 32 N. Y. 489; Child v. City of Boston, 4 Allen, 41; McCarthy v. City of Syracuse, 46 N. Y. 94; Carr v. The Northern Liberties, 35 Pa. St. 324; Dill. on Munic. Corp. vol. 2, § 801.] Judgment affirmed. Opinion by HAYDEN, J.—*Steinmeyer v. City of St. Louis.*

CONSTITUTIONAL LAW—DIFFERENT PUNISHMENT FOR SAME CRIME—CONSTRUCTION OF ACT OF MARCH 5, 1869—HABEAS CORPUS.—That part of the act of March 5, 1869, amendatory of acts establishing a court of criminal correction in St. Louis County, which prescribes a different term of punishment for the misdemeanor of criminal abortion than that in the general law, is unconstitutional. Constitution of 1865, 1, 18. The term of imprisonment for the same offense must be the same in all portions of the state. The general law provides imprisonment in the county jail for one year or less, or fine of $500 or less, or both such fine and imprisonment. The special law provides for imprisonment not to exceed six months in the work-house. When a person is imprisoned upon conviction, under the general law, in the county jail for one year, and is released on *habeas corpus* before the expiration of such term, by a judge of the circuit court, for the reason that his term of imprisonment exceeds that prescribed by the special law, such release is void; and the prisoner is properly in custody under the original commitment, and will be remanded to jail. So ordered. Opinion by BAKEWELL, J.—*In the matter of Jilz.*

ACTION FOR INJURIES TO WIFE—INSTRUCTIONS BASED UPON EVIDENCE—CONTRIBUTORY NEGLIGENCE—OF HUSBAND—OF WIFE—EVIDENCE—DUTY OF MUNICIPAL CORPORATIONS AS TO PUBLIC BUILDINGS.—In an action by husband and wife for injuries to the latter, it is not error to refuse instructions asked by the defendant as to contributory negligence of the wife, when there is an entire absence of evidence upon that point; neither is it error to refuse instructions, correct in themselves, but which are given in another form in other instructions. The husband being merely a formal party, and the action being for injuries to the wife, contributory negligence on the part of the husband would not bar a recovery. Rights of action, growing out of a violation of the personal rights of a *feme covert*, are her separate property. [Citing Acts 1875, p. 60.] It is not error to refuse an instruction in the nature of a demurrer to the evidence, where there is any evidence tending to support a verdict for plaintiff. The fact that the husband occupied a portion of the falling building, by which the wife was injured, imposed upon her no duty of inquiry into its safe condition. The evidence that defendant occupied the defective building as a market-house was material. It is the duty of the city to maintain its public buildings in a reasonably safe condition. Evidence of the former condition of the portion of the roof not blown off, was competent where the entire roof was connected, and the portion blown off was in a similar condition, when such testimony would tend to prove notice to the city of the unsafe condition of the building. Judgment affirmed. Opinion by BAKEWELL, J.—*Flori and Wife v. City of St. Louis.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON,
" JOHN W. HENRY,

JUSTICES' COURTS—JURISDICTIONAL FACTS.—The jurisdiction of courts of limited and inferior powers must somewhere appear on the face of their proceedings, or their acts are void. In an action against a railroad for killing cattle, it must appear in what township and county the killing was done, and this jurisdictional fact can not be supplied by amendment in the appellate court. Opinion by SHERWOOD, C. J.—*Haggard v. A. & P. R. R. Co.*

FORCIBLE ENTRY AND DETAINER—VERBAL LICENSE TO ENTER.—Where plaintiff in possession gave defendant license to enter, in order to make repairs, and a key to the door, plaintiff can not hold defendant as for a forcible entry by barricading the door, before the repairs were completed, and before a reasonable time for the completion thereof had elapsed, even if the defendant entered by force, the license being unrevoked. Opinion by SHERWOOD, C. J.—*Seifert v. Wittington.*

PLEADINGS—PETITION MUST SHOW SOME INTEREST OF PLAINTIFF IN THE CONTROVERSY, OR LEGAL RIGHT TO USE HIS NAME.—A petition in the name of the State of Missouri *ex rel.* John Wilson, public administrator, is bad on demurrer, when it fails to show that the state, in whose name the suit is instituted, has any interest, as trustee of an express trust or otherwise, in the controversy, and fails to show that the obligation, on which suit is brought, is one which the law requires to be made payable to the state. [19 Mo. 369; 21 Mo. 112.]—Opinion by NORTON, J.—*State to the use of Wilson v. Dodson.*

NUISANCE—ACTION FOR DAMAGES.—Where a husband, with his wife and family, occupied a house near a railroad track, and the company, by its engine, killed a horse, and suffered it to remain unburied, in hot weather, until the carcass became offensive and injurious to the occupants of the house, for which the husband might have maintained an action of damages; *held*, that upon the death of the husband the cause of action did not survive, and that his widow could not maintain the action even for the injury done to herself and children during the husband's lifetime. Opinion by NORTON, J.—*Ellis v. St. Joe, K. C. & C. B. R. R.*

LIABILITY OF CITY FOR INJURIES FROM STREETS OUT OF REPAIR—CONTRIBUTORY NEGLIGENCE.—It is error to declare, as a matter of law, that the city is bound to keep the whole of a street in repair. The duty of the city in this respect does not arise solely from the existence of the power to repair, but from considerations of public conven-

ience and necessity also; and, although a street was partially obstructed, yet, if defendant's negligence was known to plaintiff, and he failed to use ordinary care to avoid injury therefrom, the city is not liable. [Brown v. Mayor and City of Glasgow, 57 Mo. 157; Howard v. Bridgewater, 16 Pick. 189; Smith v. St. Joseph, 45 Mo. 449; Smith v. Union R. [R. Co., 61 Mo. 588]. Opinion by HOUGH, J.—*Craig v. Sedalia.*

SECURITY FOR COSTS — DISCRETION OF THE TRIAL-COURT.—Whether plaintiff in any given case shall be required to give security for costs, rests largely in the discretion of the trial-court. But this rule is not without exceptions, and there is a limit to the exercise of this discretion by the trial-court. The theory upon which security for costs proceeds is the ultimate liability and the ultimate inability on the part of the plaintiff to pay them. Where there was an interlocutory decree in favor of plaintiffs, and a reference, from which it appeared that plaintiffs were entitled to $3,658, and the referee had charged them with $3,492, and exceptions to the charges were filed and undetermined when the motion for costs was sustained; *held*, that the action of the court, in sustaining the motion, was not an exercise of a sound or judicial discretion. Opinion by SHERWOOD, C. J.—*Whitsett et al. v. Blumenthal et al.*

A SHERIFF APPOINTED TO EXECUTE THE PROVISIONS OF A DEED OF TRUST ACTS IN HIS OFFICIAL CAPACITY—DISCRETION.—Where an act, establishing a court of common pleas, provides that such court "shall have concurrent jurisdiction with the circuit court in all civil actions," such court has power to appoint a sheriff, to carry out the provisions of a deed of trust, under secs. 1 and 2, p. 1347, Wag. Sts; and when the sheriff is so appointed, he acts officially. A sale made by his deputy is valid; and the sureties on his bond are responsible for his action. Tatum v, Holliday, 59 Mo. 422. Where a motion for a new trial, supported by affidavits (counter-affidavits being also filed), is overruled, this court will not interfere with the discretion of the circuit judge, unless a strong case is made, and it plainly appears that such discretion has been arbitrarily exercised, and injustice done thereby. Opinion by NORTON, J.—*State to the use of Reed v. Griffith.*

WITNESSES—VERBAL TESTIMONY—JOINT OR SEVERAL DEBT.—The defendants, for a valuable consideration, gave to A a written promise and agreement to pay off and discharge certain enumerated debts owing by A, in which enumeration part of the indebtedness was stated as follows: "And due to B. F. Hinds and J. J. Amonett, amounting, principal and interest, to about $12,000." The plaintiff, Amonett, sued to recover two notes made to him by A, averring that the same were part of the indebtedness provided for by said contract. *Held*, that the court could not declare, as a matter of law, whether the words above-quoted imported a debt or debts due to Hinds and Amonett jointly, or meant debts due to B. F. Hinds and J. J. Amonett severally, amounting to about $12,000, and that it was proper to show the truth by verbal testimony; and that plaintiff Amonett was a competent witness, although A was dead, the contract having been made between A and the defendants, and not between A and Amonett. Opinion by HOUGH, J.—*Amonett v. Montague et al.*

ADMINISTRATOR'S SALE—APPOINTMENT OF ADMINISTRATOR DE BONIS NON, TO CORRECT ERROR IN THE DEED—PURCHASE BY THE ATTORNEY OF THE ADMINISTRATOR.—No particular form is prescribed by statute for, and no formal entry is required to be made of, the approval of an administrator's sale of real estate. When the entry in reference to such a sale was "that the report was received, and ordered to be spread upon the record," and no subsequent order of sale was made, and the administrator, in several subsequent annual settlements, was charged with the money arising from the sale, and the whole of the subsequent business of the estate was conducted on the theory that the sale had been approved, an approval will be presumed. Jones v. Manly, 58 Mo. 559. After a final settlement and the discharge of the administrator, the probate court has no power to appoint an *administrator de bonis non*, for the purpose of having a deed made to correct an error in a former deed made by the administrator; but such a correction is within the remedial power of courts of equity. Houx v. Bates Co., 61 Mo. 392. An attorney of the administrator is not prohibited from purchasing the real estate sold by the administrator under orders of the probate or county court. Opinion by NAPTON, J.—*Grayson et al. v. Weddle.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

[Filed at Ottawa, Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY,
} Associate Justices.

LEX LOCI GOVERNS IN CONSTRUCTION OF CONTRACT ONLY—STATUTE OF LIMITATIONS—GARNISHMENT—EXEMPTION EXTENDS TO NON-RESIDENTS.—1. The *lex loci* governs in determining the validity and in the construction of contracts, but in respect to the time, mode and extent of the remedy, the *lex fori* governs. 2. Statutes of limitation fixing the time within which an action may be brought, laws providing for a set-off, and statutes exempting property from levy and sale for debt, or exempting wages from garnishment, relate to the remedy only, and such laws of a state where a debt is contracted can not be invoked where the remedy is sought to be enforced in a different state. 3. The statute of this state exempting twenty-five dollars of wages due a party, who is the head of a family, and resides with the same, from garnishment, is not confined to residents of this state, but applies also to wages due a non-resident. Opinion by CRAIG, J.—*Mineral Point R. R. v. Barron et al.*

TAXES—WHO MUST APPLY FOR JUDGMENT — REPORT—NOTICE—HOW COMPLAINTS MAY BE HEARD—EFFECT OF IRREGULARITIES AND OMISSIONS — PRESUMPTIONS AS TO VALIDITY OF TAX.—1. In counties under township organization the county collector, and not the sheriff, is the proper person to make application for judgment against delinquent lands for taxes. 2. A collector's report on application for judgment, which states that it contains the list of lands, etc., upon which remain due and unpaid the amounts levied and assessed for the year 1873, and, also, which remain due and unpaid for which the property was forfeited to the state for the unpaid taxes for the year 1871 and 1872, with interest at ten per cent. and costs, and upon which remain due and unpaid the taxes and special assessments for the year 1870, together with the names of the owners as far as known, and the total amount due and unpaid on each tract, and which also states that the figures in the column headed, "Total tax," represent the total taxes due thereon respectively, is a sufficient compliance with the statute, as stating the total amount of taxes claimed to be due. 3. The collector may apply for judgment against lands for taxes at the May term, and if from any cause it is not made, or the judgment recovered, at the term, he may apply at any subsequent term, and he may fill the first blank in his notice given in section 182 of the revenue law, with the term to which he makes the application, and the second blank with the Monday on which the sale is to be made. 4. A county board may hear and determine individual complaints against an assessment for taxation through a committee of its members to whom such matters may be referred. And if such committee give notice of the time and place of their meeting to receive complaints and report their action, which is approved by the board, this will be a sufficient compliance with the law. 5. The failure to give the notice, or hold a meeting, by the assessor, supervisor and town clerk, to hear complaint against assessments for taxes, or any other error or informality in the proceedings of any of the officers connected with the assessment, levy or collection, not affecting the substantial justice of the tax itself, will not, under the statute, in any manner vitiate the tax or assessment. 6. In the absence of proof to the contrary, it will be presumed that an assessment of property for taxation has been properly made, and the tax levied is just and proper, and this especially where no complaint by the party assessed has been made to the township board of review, or to the county board. Opinion by WALKER, J.—*Beers v. The People.*

SCIRE FACIAS ON RECOGNIZANCE—AMENDMENT—PLEAS OF NIL DEBET AND DENYING JURISDICTION NOT PROPER—PLEA OF DURESS—OF PRINCIPAL NOT GOOD AS TO SURETY—FALSE REPRESENTATIONS—EVIDENCE UNDER NUL TIEL

RECORD—WHEN RECOGNIZANCE GOOD WITHOUT CAPIAS—WHAT RECORD SHOULD CONTAIN—JUDGMENT.—1. A *scire facias* on a recognizance, being both process and declaration, is subject to the same rules of amendment as declarations in other cases. The proceeding is not criminal in its nature, but to enforce the payment of money due on a contract. 2. When a recognizance is returned to and filed in the office of the clerk of the circuit court, it becomes a record of that court, and, therefore, pleas to a *scire facias* issued thereon, that the defendants did not make and execute the recognizance, and *nil debet*, are not proper. 3. If the sureties in a recognizance plead to a *scire facias* thereon that there is no return of *nihil* indorsed on the writ as to the principal, the court may allow an amendment of the return, and thereby obviate the plea. 4. A plea to a *scire facias* upon a recognizance that at the time of entering into the recognizance the principal was not in the legal custody of the sheriff taking the same, upon any indictment, or upon any process of *capias* ordered to be issued against the principal, by authority of law, is bad on demurrer, as no order is required for issuing a *capias* against one indicted, and as not showing wherein the imprisonment by the sheriff was unlawful. 5. A surety can not plead the *duress* of his principal in a recognizance as a discharge of his own liability. 6. A plea by the sureties to a *scire facias* on a recognizance that the principal and sureties entered into the same under the false and fraudulent representations of the sheriff that the principal was then in his legal custody, and confined in jail under due process of law, whereas such was not the fact, negativing the truth of the representations, is manifestly insufficient, as the representations relate to a legal question of which the defendants are required to judge for themselves. 7. Under the plea of *nul tiel* record to a *scire facias* on a recognizance, if the recognizance of record and a judgment of forfeiture is given in evidence, this will be sufficient to authorize a judgment for the people. 8. Where an indictment is found and the amount of bail fixed, and the accused voluntarily comes before the sheriff, without his having a *capias*, and enters into a recognizance for his appearance, the recognizance will be good and binding. 9. If a sheriff, in a criminal proceeding, takes recognizance for a larger sum than is fixed by the court, it will be a nullity. But this fact must be shown in defense. 10. If the clerk copies into the transcript of a proceeding by *scire facias* the bail fixed by the court on the back of an indictment, it will constitute no part of the record, without being incorporated into the bill of exceptions. 11. The proper course on default in the performance of the conditions of a recognizance is to enter a judgment declaring the same forfeited. It is not required that it should be for the recovery of any sum of money whatever. Opinion by SHELDON, C. J.—*Peacock v. The People.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE,
" W. B. RODMAN,
" W. P. BYNUM,
" THOMAS SETTLE,
Associate Justices.

TENANT BY THE COURTESY—PARTITION.—A court has no power to order a sale of land for partition, when one of the defendants interested therein is tenant by the courtesy. —*Parks v. Siler.*

USURIOUS CONTRACT—HOW TREATED BY COURTS OF EQUITY.—A court of equity is as much bound by the statute of usury, as a court of law, and will not allow the lender to enforce his usurious contract. When called upon by the borrower for assistance to protect him, it will give it, but will require him to do equity, by paying the principal money and legal interest.—*Beard et al. v. Bingham et al.*

CRIMINAL LAW—WHEN CONFESSIONS ADMISSIBLE.—Confessions only which come of penitence, and are voluntary, ought to be allowed to convict. If there be threats of harm, or promises of favor, inflictions of pain, or demonstrations of violence, then the confessions are attributed to such influences, and are not admissible.—*State v. Houston.*

VERDICT RENDERED IN ABSENCE OF DEFENDANT.—A verdict returned by the jury to the clerk, in the absence of the defendant and while the court was taking a recess, was properly set aside on motion of defendant. It was within the power of the court, *mero motu*, to set aside a verdict so rendered.—*Epps' case.*

EXTENT OF POWERS OF NOTARIES PUBLIC.—The authority of notaries public residing out of the state is confined to the authentication of commercial paper and to the protesting of bills of exchange and the like. Chapter 76, Battle's Revisal, is confined to notaries resident in the state; those residing out of the state have no authority to verify affidavits to be used in our courts.—*Hall v. Hall.*

RAPE—FRAUD—INSTRUCTION.—Upon a trial for an assault with intent to commit rape, it is error for the presiding judge to charge the jury "that, before they could find the defendant guilty, they must be satisfied that his intention was to ravish the prosecutrix, to have illicit connection with her by force and against her will, or that he intended to do so by committing a fraud upon her, by falsely personating her husband." The jury should have been instructed to consider whether the defendant's intention was to accomplish his purpose by force, if necessary, or by exciting and soliciting her consent without force, or by fraud in personating her husband, and that in the first view he was guilty, but in either of the others, he was not guilty.—*State v. Brooks.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1876.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" SAMUEL E. PERKINS,
" GEORGE V. HOWK,
Associate Justices.

DIVORCE — EVIDENCE — STATUTE CONSTRUED.— Under the statute (2 R. S. 1876, 326, sec. 7) the *bona fide* residence of the petitioner in the state for two years, and in the county where the petition is filed for at least six months, immediately preceding the filing of such petition, is a jurisdictional fact which ought to be averred in a petition for divorce, and which must be proven to the satisfaction of the court by at least two resident freeholders and householders of the state, before such court will have any authority to decree a divorce; and the proper averments in the petition, without evidence to sustain them on the trial, are not sufficient to support the decree. Judgment reversed. Opinion by HOWK, J.—*Powell v. Powell.*

CITY ATTORNEY'S FEES—CITY NOT LIABLE TO PAY DOCKET FEES WORKED OUT.—Under the statute providing that the city attorney "shall prosecute all actions in favor of the city, and defend all actions brought against such city for any cause, but in no case shall the city be liable for costs," the docket fees are to be charged up as costs against defendants in such prosecutions; and when defendants in such prosecutions before the mayor are adjudged to, and do work out the fine and costs, the city does not become equitably bound to the city attorney for the docket fees thus worked out for the city, and an action for their recovery can not be maintained. Judgment affirmed. Opinion by WORDEN, C. J.—*Tuley v. City of Logansport.*

EMPLOYER AND EMPLOYEE — CONTRIBUTORY NEGLIGENCE — IMPEACHMENT OF WITNESS.—An employer is bound to give persons of tender years, whom he employs, due caution, explanation and instruction, when he puts them to work in a dangerous and hazardous place, and the mere fact that the employee could have seen that such place was hazardous and dangerous by exercising his faculty of sight, is not sufficient of itself to hold him accountable for contributory negligence; but that is a question for the jury to determine from all the facts. In laying the foundation for the impeachment of a witness, upon the ground that he has made statements out of court different from his testimony, the time when, the place where, and the person to whom such statements were made, must be clearly pointed out. Judgment affirmed. Opinion by BUSKIRK, J.—*Hartman v. Gust.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

WRITTEN DOCUMENT—EXTRINSIC EVIDENCE.—It is not necessarily a fatal objection to the admission of a writing, that, considered by itself and without explanation from extrinsic matters, it is wholly unintelligible. If such extrinsic matters interpret its meaning and show its bearing upon the controversy, it may not only be competent and relevant, but absolutely decisive of the case. Opinion by BREWER, J.—*Walters v. Van Derveer.*

APPEAL—WHEN JUDGMENT WILL BE AFFIRMED WITHOUT ARGUMENT.—Where every legal question involved in a case has already been passed upon by the supreme court in other cases, and when the court below has committed no error for which the judgment of such court can be reversed, such judgment will be affirmed without any discussion of any of the questions involved in such case. Opinion by VALENTINE, J.—*Betiman v. Richardson.*

FORCIBLE ENTRY AND DETAINER—WHEN AND WHAT NOTICE NECESSARY.—A party desiring to commence an action of forcible entry and detainer should, at least three days before commencing his action, notify the adverse party by a notice in writing, to leave the premises in dispute (Gen. Stat. 810, sec. 161); and if he should not do so, he could not maintain the action. And this notice should show clearly who claims to be entitled to the possession of the premises, and who makes the demand therefor; and then no one, but the person who thus claims the premises and makes the demand, can maintain the action under such notice. Opinion by VALENTINE, J.—*Nason v. Best.*

ACTION ON RECOGNIZANCE—INFANCY OR PARDON NO DEFENSE.—1. An action on a forfeited recognizance may be maintained against a person who executed the same to procure his own personal liberty, although such person may have been a minor at the time he executed the same, having a guardian for his property, and although he may have executed the same without the consent of his guardian. 2. And such action may be maintained, although the governor may have pardoned the defendant after sentence in the criminal action and before final judgment on the forfeited recognizance. Opinion by VALENTINE, J.—*Weatherwax v. The State.*

ACTION ON PROMISSORY NOTES — DEFENCE UNDER LIQUOR ACT—EVIDENCE.—1. Where an action is brought upon three promissory notes, and the only defense made is that the notes were given for liquors sold in this state without a license, and the evidence does not tend to prove the defense; *held*, the court below committed no error in instructing the jury to return a verdict for the principal and interest of the notes sued on. 2. The cases of McCarty v. Gordon, Gill v. Kaufman & Co., 16 Kas. 35, 571, Haug v. Gillett and Williams v. Feiniman, 14 Kas. 140, 288, cited as decisive of the question presented in the case. Opinion by HORTON, C. J.—*Snider v. Kœhler.*

CONSTRUCTION OF STATUTES — DRAM-SHOP ACT.—1. Statutes are not considered to be repealed by implication, unless the repugnancy between the provision of the new and the former statutes is plain and irreconcilable, and, *held*, that the statute authorizing cities of the third class to license the sale of intoxicating liquors does not repeal the provisions of the dram-shop act of 1868. 2. Different statutes relating to the same subject-matter are to be construed together. 3. Cities of the third class have the power to license persons to sell intoxicating liquors within their limits, subject to a compliance with the provisions of the dram-shop act of 1868. 4. The presentation of a petition to the city council by a person applying for a dram-shop license, as required by section 1 of the dram-shop act of 1868, is an essential condition precedent to the validity of a license to sell intoxicating liquors within the limits of a city of the third class; *held*, that a license granted by the corporate authorities of a city of the third class, in violation of the provisions of said act, is no protection to the license and is null and void. Opinion by HORTON, C. J.—*State v. Young.*

ACTION ON PROMISSORY NOTE—DEFENSE OF USURY—ENDORSEE.—Where H executes a promissory note payable to S or order, and afterwards R commences an action thereon against H, alleging that he, R, purchased said note before due for a valuable consideration, and that he is now the owner and holder thereof, but does not allege or show in his petition or elsewhere that said note was ever indorsed or was ever transferred by indorsement, and the defendant sets up in his answer and afterwards proves on trial that said note was given for usurious interest; *held*, that said defendant set up and proved a good defense to the note; that a note payable to order can be transferred freed from all equities only by indorsement; and that a transferee of such note must allege and prove that the note was transferred by indorsement, if he desires to avoid such equities or defenses as may be set up against it. Opinion by VALENTINE, J.—*Hadden v. Rodkey.*

NOTES.

ONE BY ONE the thieves of the whiskey-ring are receiving full pardon from the government they so basely betrayed. One by one, with equal certainty and regularity, the government officials who faithfully—too faithfully, it would seem—performed their sworn duties in prosecuting those thieves and conspirators, are being removed from office. Not to put it too strongly, this course of action is getting considerably monotonous. Hon. J. S. Botsford, U. S. District Attorney for the Western District of Missouri, is the last victim of this singular scheme of rewards and punishments. It will be a serious blow to the public service, when it comes to be fully understood, that to do one's duty zealously, fearlessly, and with effect, will bring down certain and condign punishment upon his head. Such, we confess with sorrow and shame, seems now to be the rule.

WE ARE sorry to have received a notification from the Philadelphia post-office of the suspension of that valuable weekly law journal, the *Legal Gazette*. The lesson of the failure of the *Gazette*, to our minds, is this: that, in order to succeed, a law journal must either be first-class in point of merit, and really worthy of the support of the profession, or else it must be supported by a heavy list of local advertising. The *Legal Gazette* had neither of these advantages. It was a tolerable case reporter; but its value was confined chiefly to Pennsylvania lawyers; and when Messrs. Kay & Bros. started *The Weekly Notes of Cases*, it became evident that some of the Philadelphia law journals must give way before a superior publication. The *Legal Gazette*, although being a better publication than its competitor, the *Legal Intelligencer*, it seems, was the first to succumb, owing, doubtless, to the fact that it was not backed by the court advertising, which appears to have been the chief support of the latter journal.

COTTON TIES.—An interesting decision was rendered lately in the United States Circuit Court for the Southern District of Georgia, in the case of the American Cotton Tie Company v. Groover *et al.* The case arose on a motion for injunction to restrain the defendants from selling what are known as "Arrow ties." The plaintiffs own the patents for making these ties. It was stated that the defendants had been engaged in selling cotton ties which had been originally sold by the plaintiffs with a stamp on them; that they were "licensed for use once only," which ties had been used once. It was alleged that the parties from whom the defendants obtained their ties were engaged in gathering ties so stamped which had been used once, and then piecing the old band so as to fit them to be used again. It was contended by plaintiffs that this was in violation of plaintiffs' right under their patents. It was also contended that arrow ties, not having these words stamped upon them, were frequently made to counterfeit plaintiffs' ties, and that they were liable to be counterfeited by any one, and that, if defendants sold unstamped arrow ties, they should be required to show that they had been legally purchased of the plaintiffs, his licensees or vendees. Judge Woods granted the motion asked for, and an injunction was issued ordering that "the defendants be enjoined from selling ties known as the 'Arrow tie,' unless said ties be purchased directly from the complainant or his duly authorized licensees or their vendees, or vendees of vendees; and from selling ties stamped with the words 'licenses to be used once only,' or words of similar import, after said ties have been used once."